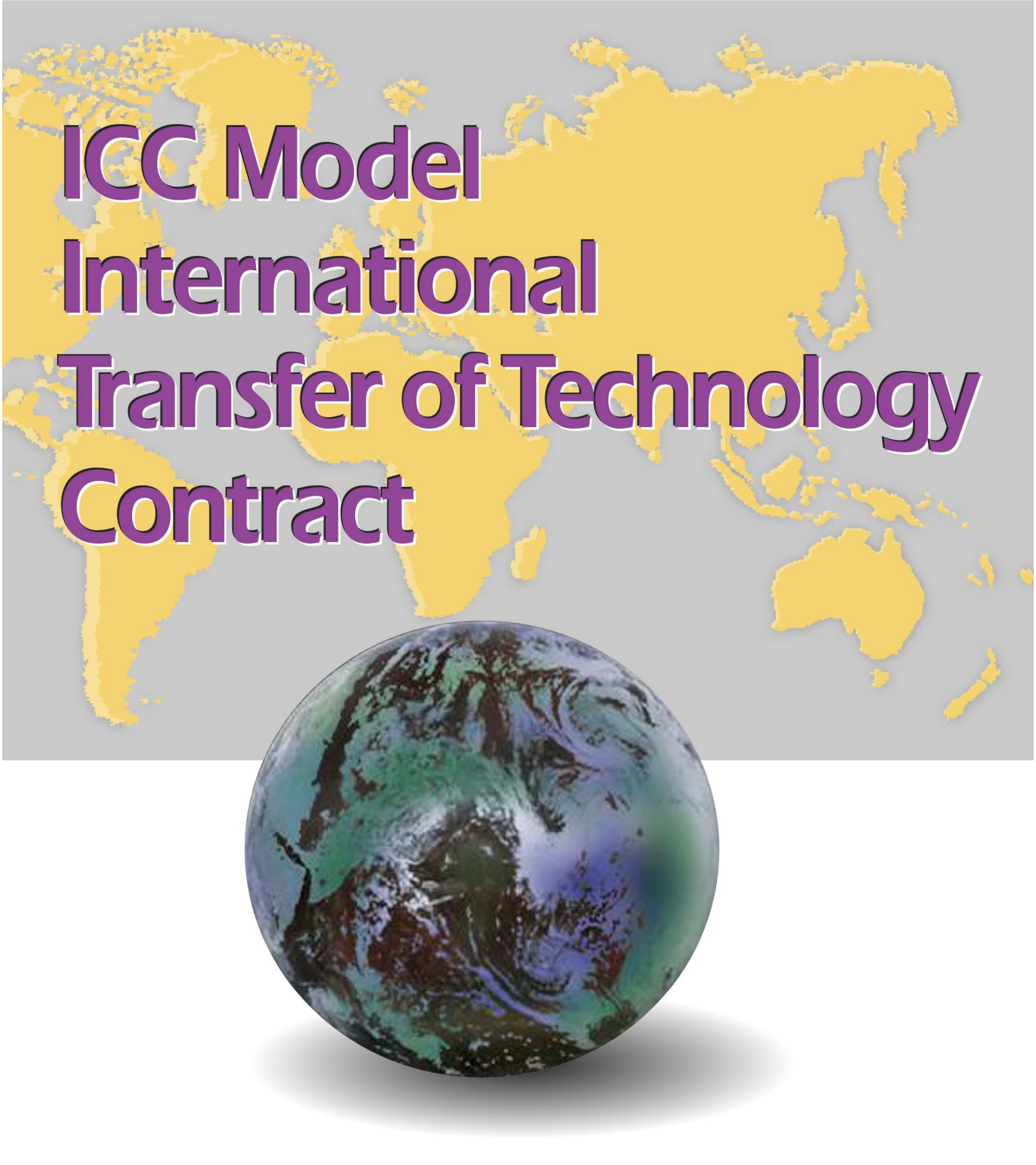
ICC Model International Transfer of Technology Contract



International Chamber of Commerce

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ICC Model International Technology Transfer Contract

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FOREWORD

The transfer of technology is an increasingly important feature of commercial transactions, reflecting the increasing importance of intellectual property in the modern knowledge economy. Businesses from all sectors, large and small, find themselves negotiating deals involving technology transfer, often across national borders. In order to provide businesses with an accessible resource for a subset of technology transfer transactions, the International Chamber of Commerce has prepared this Model International Technology Transfer Contract.

Designed for use by non-specialists in the area who are seeking reliable guidance and an adaptable contractual framework, this model covers situations where a company, which itself manufactures certain products, licenses to another company a global package of information and intellectual property rights in order to put the licensee in the condition to manufacture the products using the licensor's technology. As with existing ICC model contracts, the model seeks to balance the interests of the licensor and licensee across a range of industries, and provides comprehensive notes and guidance regarding issues requiring consideration by the parties.

This is the latest in a series of successful ICC model contracts prepared by a dedicated Task Force under the auspices of the ICC's Commission on Commercial Law and Practice, chaired by Professor Fabio Bortolotti (Italy). The model has benefited from the active participation of the Chair, Mr Bortolotti, the Rapporteurs, Jacques Beglinger (Switzerland) and Mark Reutter (Switzerland), and the following Task Force members: Gerhard Aulmich (Germany); Thomas Wilhelm Buehlmeyer (Germany); AudeGazet-Talvande (France); Didier Ferrier (France); Vladislav Kuvshinov (Russia); Lauri Railas (Finland); Gonçalo Moreiro Rato (Portugal); Jean-François Serrier (Belgium); Oliver Vaes (Belgium); Marco Venturello (Italy); René Marcel von Samson-Himmelstjerna (Germany); and Jan Pieter Witsen Elias (The Netherlands).

INTRODUCTION

1. What is a technology transfer contract?

The term "transfer of technology" may cover a variety of situations, ranging from patent and/or know-how licenses to more complex dealings involving the supply of technical assistance, equipment, etc.

This model covers the situation where a company (licensor), which itself manufactures certain products, licenses to another company (licensee) a global package of information and intellectual property rights in order to put the licensee in the condition to manufacture the products using the technology of the licensor.[1]

A characteristic of this type of agreement is that the package of transferred information and rights is more important than an exclusive right to any of them individually. In other words, the licensee expects to obtain all the information, technical assistance, intellectual property rights, etc. necessary for enabling it to manufacture the contractual products to the quality standards of the licensor and with the licensor's technology: the individual elements put at its disposal are important only to the extent they are necessary for attaining this goal.

So, for example, it is typically the case that the licensee will not lose interest in the deal simply because a certain patent expires or part of the licensor's know-how is no longer secret, provided this does not prevent the manufacture of the products with the licensed technology.

Typically, therefore, the contract should be construed such that the early expiration or invalidity of a few non-basic patents in a licensed patent portfolio or the public disclosure of a relatively minor part of the know-how does not necessarily affect the validity of the licence or its consideration (except, of course, where the exclusivity obtained by the licensee through the patents or the secret know-how is the main reason for entering into the contract).

2. The possible contents of the contract

Since the technology transfer contract is a global package, its actual contents will vary substantially from case to case, depending on what the licensor has to offer and what the licensee actually needs.

In some cases, the licensor will license the right to manufacture specific products it has designed, which means that the licensee will obtain, in addition to the technology for the manufacture of the products, the detailed design of one or more specific products developed by the licensor. In other cases, the licensee will obtain only the technology for a product that it will develop itself or with the assistance of the licensor, but which will be manufactured with the licensor's technology.

1 This situation arises frequently in the mechanical industry. In other industries, such as the chemical industry, succesful transfer of technology may be much more dependent on the validity of patents.

Another aspect that may vary substantially from case to case is the supply (or assistance for the purchase) of equipment. In some cases, the licensor will limit itself to advising the licensee about the equipment needed to obtain the best results with the licensed technology. In others, the parties may agree that the licensor supplies certain equipment (e.g., special tools) to the licensee.

Note that this model does not contemplate the incorporation into the licence of a contract for the supply of equipment.

The licensor may also supply components to the licensee, particularly where the licensee wishes to implement the manufacture of the products gradually.

Finally, the licensor may also grant the right to use its trademarks. This is addressed below in Section 4.

3. The licensor as a manufacturer using the licensed technology

It is important to note that this model is based on the assumption that the licensor is a company manufacturing the products that form the subject matter of the technology licence.

This situation raises a number of issues.

First, where the licensor itself manufactures such products, the licensing will typically be an accessory activity with respect to its core business. Consequently, the licensor may lack specific experience in licensing. Moreover, its technology, mainly used for its own needs, will normally not be set out in a form readily transferable to a third party and may need to be adapted for the purpose of transmitting it to the licensee.

Second, if the licensee is to manufacture the same products the licensor manufactures, competition problems will be critical, as the licensor will aim to protect its own market from competition by the licensee. This may be achieved in different ways. For example, the licensor may license a product that is no longer up-to-date in its home market, but can be still successfully sold in the territory of the licensee. Or the parties may agree that the licensee will not sell the licensed products in certain territories reserved to the licensor. Of course, these problems will be far less critical if the licensed products are substantially different from those produced by the licensor, although made with the same technology.

In any case, to the extent that the licensor is sharing something that gives it a competitive advantage in the marketplace, the assessment of the possible competitive impact between the parties is of paramount importance when drafting the contract.

4. The option of licensing the trademark

Though this model does not provide for it, the possibility of granting a trademark licence is an option that should be considered with the utmost attention.

If this solution is chosen, the licensee will be able to benefit from the reputation of the licensor's trademark, which may substantially facilitate the sale of the licensed products.

On the other hand, this may limit the future growth of the licensee, because the licensee will create a market for a trademark it does not own and that it has the right to use only for the duration of the trademark licence.

Where the trademark is licensed, the licensor must control the quality of the licensed products thoroughly because of the risk to its reputation if products not conforming to the licensor's quality level are put on the market and, possibly, because of product liability implications.

All of this means that the inclusion of a trademark licence may imply substantial modifications to the licence contract.

If the parties agree to provide for a trademark licence, it should as a general rule be included in a separately negotiated agreement, which should of course be coordinated with this model.

5. Possible buy-back of the product

A possible additional arrangement could involve the licensor purchasing some of the products made by the licensee, in which case it is likely that the licensor will request the licensee to put its trademark on such products (but this would of course not amount to a trademark licence, since the trademark would be used on behalf of the licensor). This "buy-back" option may be of interest for both parties, because it may increase the output and thus reduce the costs of the licensee and because it may allow the licensor to delocalize part of its production to a country with lower manufacturing costs.

As with a trademark licence, the parties may incorporate such a buy-back arrangement in a separate contract, which should be coordinated with this model.

6. Antitrust issues: EC Regulation 772/2004

As a general rule, the model does not take into account specific mandatory rules of national laws that might affect the drafting of the various clauses.

However, as regards competition rules of the European Community, which now apply in more than 25 countries, the model does offer alternative contractual solutions conforming to these rules.

In the European Community, transfer of technology contracts are governed by Regulation 772/2004 (the "Regulation"), which grants a block exemption pursuant to Article 81(3) of the EU Treaty to all transfer of technology agreements that comply with the conditions set out in the Regulation.

The Regulation (annexed hereto as Appendix I) makes a basic distinction between agreements between competing undertakings and agreements between non-competing undertakings.

Where the licensor and licensee are competitors, the block exemption applies only when the combined market share of both parties does not exceed 20% and provided the agreement does not contain any of the hardcore restrictions listed in Article 4(1) of the Regulation.

Where the licensor and licensee are not competitors, the block exemption applies when the market share of each of the parties does not exceed 30% and provided the agreement does not contain any of the hardcore restrictions listed in Article 4(2) of the Regulation (which are less strict than those applicable to the agreements between competitors).

In order to decide whether the parties are competitors, reference should be made to Article 1(j) of the Regulation, which defines competing undertakings as follows:

(j) competing undertakings' means undertakings which compete on the relevant technology market and/or the relevant product market, that is to say:

(i) competing undertakings on the relevant technology market, being infringing each others' intellectual property rights (actual competitors on the technology market); the relevant technology market includes technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use.

(ii) competing undertakings on the relevant product market, being undertakings which, in the absence of the technology transfer agreement, are both active on the relevant product and geographic market(s) on which the contract products are sold without infringing each others' intellectual property rights (actual competitors on the product market) or would, on realistic grounds, undertake the necessary additional investments or other necessary switching costs so that they could timely enter, without infringing each others' intellectual property rights, the(se) relevant product and geographic market(s) in response to a small and permanent increase in relative prices (potential competitors on the product market); the relevant product market comprises products which are regarded by the buyers as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices and their intended use.

It is impossible to decide if the parties are competing undertakings without considering all the specific circumstances of the case.

Nevertheless, it is likely that in the most common situation (i.e., where the licensor is not active on the geographic market of the licensee and the licensee is not active on the licensor's market), parties will be considered as non-competing undertakings on the product market. The answer might be different if we consider potential competition, though in most cases the licensor's ability to directly produce or sell in the licensee's geographic market will not be realistic. Moreover, the definition of potential competition contained in Article 1(j)(ii) of the Regulation is rather restrictive.

As regards the relevant technology market, competition between the parties can generally be excluded, except in the unusual case where the licensee is an active licensor of a competing technology.

Given this, the EC-compliant alternative clause of Article 5.1 B of the model assumes that the licensor and the licensee are non-competing undertakings and that consequently the rules on technology transfer agreements between non-competitors would apply.

However, should the parties have any doubt about a possible competitive relationship between them, they should consult an expert and verify the contract clauses in view of their compliance with the stricter conditions for competitive undertakings set out in Article 4(1) of the Regulation.

7. Entry into force of the contract

Parties often make the entry into force of the contract conditional upon certain events, some of which may be partly outside their control (e.g., government authorizations or bank guarantees).

The model, however, provides in Article 3.1 that the agreement enters into force on the date of signature and that events of the kind indicated above are conditions only with respect to the commencement of the contract.

Accordingly, the main obligations under the contract arise only at the commencement date, which takes place if and when the events listed in Annex 2 occur.

As regards the events which are necessary for the contract's effectiveness, the drafters prefer not to use the word "condition", since certain events (such as the provision of an advance payment by a party) are not "conditions" in the legal meaning of the word within some jurisdictions. In order to avoid possible disputes that this might cause, a more neutral term (event) has been used.

Annex 2 sets forth a list of possible options for the parties to consider.

8. Force majeure and confidentiality

The model, in Article 15, incorporates by reference the ICC Force Majeure Clause 2003, the ICC Hardship Clause 2003 and the ICC Confidentiality Clause.

9. Applicable law

As with all ICC model contracts, this one provides in Article 18 A for the possibility that it will not be governed by a particular national law, but, rather, by the provisions of the contract itself and the principles of law generally recognized in international trade as applicable to transfer of technology contracts (also called *lex mercatoria*). Thus, the model applies in a uniform way to licensors and licensees of different countries, without giving either party the advantage of applying its national law or the law of a third country.

Note that this solution, while avoiding the particularities of national laws, gives a broad discretionary power to national courts or arbitrators in the case of disputes, since it is based (at least for matters not expressly governed by the contract clauses) on very general principles.

The drafters are of the opinion that the possible disadvantages of applying rather flexible and general rules are counterbalanced by the greater certainty afforded by recourse to contractual rules and by the reference to a set of general rules on contracts, like the Unidroit Principles of International Commercial Contracts (the "Unidroit Principles"), which offer a reasonably foreseeable legal framework for most issues that may arise.

Note, though, that Article 18 A provides that the Unidroit Principles apply only to the extent that they do not conflict with general principles and trade usage, as Article 18 A ranks the various sources of applicable law incorporated by reference into the model in the following order: contract clauses, general principles, trade usages and the Unidroit Principles.[2]

In any case, if the parties wish to have their contract governed by a specific national law, they can use the alternative set forth in Article 18 B. In such cases, they should check carefully whether any provisions of this model form violate mandatory provisions of the national law they have chosen.[3] Choosing an applicable national law is preferable where parties submit the contract to the jurisdiction of ordinary courts instead of arbitration, since national courts may be disinclined to consider general principles, *lex mercatoria* and the like as the governing law of a contract.

10. MANDATORY RULES OF THE COUNTRIES OF THE RESPECTIVE PARTIES

If the parties have chosen an applicable law other than that of their respective countries, they should check whether any mandatory rules of the licensee's or licensor's country may nevertheless be applicable.

If these rules are simply "internally mandatory", the choice of a foreign law will be effective, and the rules of the law chosen by the parties will apply instead of those of the licensee's or licensor's country.

If, on the other hand, such rules are "internationally mandatory", i.e., rules that must be respected even if a contract is submitted to a foreign law, the parties should carefully consider this issue.

2 This solution takes into account that a limited number of provisions of the Unidroit Principles may not actually reflect the expectations of international trade. This may be the case with respect to certain rules that protect a disadvantaged party to an extent that goes beyond the standards that are usual in business-to-business relations. See, for instance, para. I of Article 3.10 on gross disparity, where reference is made to "the improvidence, ignorance, inexperience or lack of bargaining skill" of a party in order to justify contract avoidance, and the rules on hardship contained in Articles 6.2.1-6.2.3, particularly with regard to the rule authorizing courts to modify the contract terms. With respect to such rules, general principles of law and trade usages will prevail over the Unidroit Principles. Of course, parties may also expressly exclude the application of specific provisions of the Unidroit Principles that they consider inappropriate. In any case, there is an express reference to the ICC Hardship Clause 2003 (see Article 15.2).

3 Even if no choice of a national law has been made, internationally mandatory rules (i.e., rules that would be applicable independently from the applicable law, so-called "lois de police") of a national law that is closely connected to the contract may be applicable in certain circumstances.

In such cases, contractual clauses that do not conform to the internationally mandatory rules of the licensee's or licensor's country will not be effective in that country (and will in principle be disregarded by the local authorities).[4]

11. Jurisdiction and arbitration

Since this model is a set of uniform contractual rules, avoiding (as far as possible) the direct application of domestic legislation, it is appropriate that possible disputes be solved by a uniform dispute resolution system organized on an international level.

Thus, the best solution may be international commercial arbitration, as provided for in Article 17.2 A, which permits a truly international approach and avoids the risk of national bias that could arise in the case of recourse to domestic courts.

If, however, the parties prefer recourse to national courts, they may choose Article 17.2 B. As noted in Section 10 above, this solution should be avoided if reference is made to *lex mercatoria*, general principles, etc.

12. Tax issues

Many countries levy a withholding tax on cross-border royalty payments when paid to non-resident licensors. However, the term "royalties" covers a wide range of payments under domestic law in different jurisdictions that may be subject to a different tax treatment. It generally refers to payments for the use of, or the right to use, intellectual property, know-how or copyrights. In several jurisdictions, technical service fees are considered royalties.

When a tax treaty is applicable, it usually limits the domestic definition to payments for the use of, or the right to use, intellectual property. As royalty income is essentially a payment relating to the usage of intangible assets, a capital payment for the purchase of intellectual property will not normally be a royalty. Similarly, technical assistance fees are generally excluded from the definition of royalties in tax treaties and are consequently not subject to withholding tax.

When royalties are taxable, the tax is usually collected by the licensee out of the payment made to the licensor, either on the gross payment with no current expense deduction or on a net basis. The net amount may be computed with an expense deduction based on a flat rate derived from an estimated fixed percentage or on the actual expenses incurred.

Since the technology being transferred under this model contract is a global package, there is a significant risk that a withholding tax or customs tariffs may be levied on the full amount of the royalty even if part of it (e.g., in relation to technical assistance and/or supply of manufacturing equipment) is not liable to such a tax. In order to avoid such an issue, the parties may find it useful to provide in the contract a specific remuneration in respect of the components of the royalty that are not subject to withholding tax or customs tariffs.

4 This aspect may be very important where the transfer of funds (e.g., for payment of royalties) must be authorized by the local authorities of the licensee's country.

When a foreign licensor is involved, it is common for a contract to permit the licensee to make payments of withholding tax to the tax authorities from royalties otherwise due to the licensor, subject to providing the licensor with evidence of such withholding to enable the licensor to make submissions to its own tax authorities for appropriate tax relief (tax credit).

Alternatively, the parties may agree that all taxes assessed at source in the licensee's country, on the income of the licensor, with respect to the agreement shall be borne by the licensee. However, the parties should be warned that the legal validity of such clauses may be questionable in certain jurisdictions.

Finally, parties should note that assistance given by licensor in the licensee's territory may be construed by tax authorities in that territory as the creation of a permanent establishment on the part of the licensor.

Parties are strongly advised to consult with qualified tax counsel before entering into this agreement in order to avoid unanticipated complications.

13. PRECAUTIONS FOR USE OF THE MODEL FORM

Any model contract should, to the greatest extent possible, be adapted to the circumstances of the case in question.

In theory, the best solution is to draft an individual contract based on existing model forms in order to take account of all the specific requirements of the parties to a particular transaction. However, the parties are often not in a position to prepare a specific contract and prefer to have recourse to a ready-to-use balanced model form that can be used as it stands, without any need to make modifications or additions.

The present model is an attempt to achieve a balance between these two possibilities.

ICC has tried to work out a single solution for every issue. Where this has not been possible (e.g., Articles 5.1, 10.1, 12.2, 14.1, 16.4, 17.2 and 18), alternatives have been suggested.

Such alternative solutions have been presented side by side under the letters A and B, in order to highlight the fact that parties must select one of them.

Therefore, before signing the contract, the parties must decide which of the alternative solutions they prefer, and then delete the alternative they do not want to apply.

In any event, the model form provides in Articles 20.8 and 20.9 that, if the parties do not make a choice by cancelling one alternative, one of them will automatically apply.

It is recommended that users of this model contract seek the advice of legal counsel before finalizing the contract.

ICC MODEL INTERNATIONAL TRANSFER OF TECHNOLOGY CONTRACT

BETWEEN

....
("Licensor")

AND

....
("Licensee")

WHEREAS, Licensor has developed [description of products] and possesses certain know-how and intellectual property rights relating thereto;

WHEREAS, Licensee wishes to manufacture and market such products; and

WHEREAS, Licensor is willing to grant, and Licensee wishes to obtain, the exclusive rights to use such know-how and intellectual property rights in the Territory, as that term is defined herein.

NOW, THEREFORE, in consideration of the mutual promises, terms and conditions set forth hereinafter, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties do hereby agree as follows:

Article 1

DEFINITIONS

"*Commencement Date*" shall have the meaning indicated in Article 3.

"*Contract*" shall mean this transfer of technology contract together with its Annexes.

"*Initial Term*" shall have the meaning specified in Article 16.1.

"*Know-how*" shall mean Licensor's technical knowledge, written or oral, relating to the design and manufacture of the Products. Know-how includes, but is not limited to, Technical Documentation and secret or qualified Know-how.

"*Licensed Technology*" shall mean the Know-how, Patents, copyrights, and other intellectual property rights contemplated in this Contract.

"*Manufacturing Equipment*" shall mean the equipment, software, tools and test equipment (if any) listed in Annex 7.

"*Minimum Royalty*" shall mean the minimum royalty specified in Annex 10-C.

"*Net Sales Value*", relevant to the calculation of the Royalty, shall mean the invoiced sales value of the Products, sold by Licensee [5], such Net Sales Value shall not include, to the extent that they are evidenced in the invoice: (a) normal sale discounts to Licensee's customers; (b) insurance, packaging and transportation expenses of the Products; and (c) tax or duties paid by Licensee on the sale of the Products.

"*Parts and Components*" shall mean the items (if any) to be incorporated into the Products, listed in Annex 11, which Licensee may purchase from Licensor.

"*Party*" or "*Parties*" shall mean Licensor and/or Licensee.

"*Patents*" shall mean the patents, utility models, industrial designs and the relevant applications listed in Annex 3.

"*Product(s)*" shall mean the products listed in Annex 1, to which the licence granted under Article 4.1 relates.

"*Renewal Term*" shall have the meaning specified in Article 16.1.

"*Royalty*" shall mean the royalty specified in Annex 10-B.

"*Successor Products*" shall mean products developed by Licensor that replace one or more of, are based on the same design as and contain only minor differences to the Products.

"*Technical Documentation*" shall mean the documentation relating to the design and manufacture of the Products specified in Annex 4.

"*Territory*" shall mean the area(s) described in Annex 6.

Article 2

GOOD FAITH AND FAIR DEALING

2.1 In carrying out their obligations under this Contract, the Parties shall act in accordance with the principles of good faith and fair dealing.

2.2 The provisions of this Contract, as well as any statements made by the Parties in connection with it, shall be interpreted in accordance with the principle of good faith.

5 In the rather unlikely case that Licensee sells the products to a subsidiary, the definition may not be appropriate.

Article 3

ENTRY INTO FORCE OF THE CONTRACT

3.1 This Contract shall enter into force on the date of signature by the second of the Parties.[6]

3.2 The grant of the licence and related obligations shall commence on the date on which the latest of the events listed in Annex 2 has occurred (the "Commencement Date") and the Parties shall undertake all necessary steps for facilitating the occurrence of them. If no event has been listed in Annex 2, the Contract obligations shall commence on the date this Contract enters into force.

3.3 If the Commencement Date has not occurred within six months from the date of entry into force (or within such other term as may be agreed between the Parties according to Annex 2), either Party may terminate this Contract by written notice to the other Party.

Article 4

GRANT OF RIGHTS AND LICENSES

> As explained in Section 1 of the Introduction, in the context of this Contract, Licensee pays for the use of the package of Licensed Technology more than for its components considered individually. This implies that IP rights (like Patents or Know-how) tend to have an accessory character: they must be licensed in order to put Licensee in a condition to use the technology without infringing any right of Licensor (or third parties, if IP rights of third parties are involved), but the real value of the Contract is the technology as such, independent of its protection as IP rights. In other words, if it appears at a later stage that some Patents are invalid or that part of the Know-how is not secret, this will in principle not affect the balance of the Contract, because the subject matter is the technology as such and the value of such technology is not significantly affected if some Patents become invalid (unless this results in third parties becoming able to prevent Licensee from lawfully using the technology and manufacturing the Products).
>
> If, on the contrary, some IP rights are essential, in the sense that they constitute the very reason for the licence (e.g., the reason for entering into the Contract is that Licensee wants to be the only one who can use a certain Patent), the situation is radically different and it would be justified that a possible nullity of the Patent or disclosure of the Know-how to the public involves the nullity of the Contract or, at least a significant reduction of the remuneration. Where this is the case, the Parties should make the necessary adaptations to the Contract.

6 The Parties might consider adding an additional clause on each Party's possible obligation to register: "Each of the Parties hereby undertakes that it will carry out, or cause to be carried out any registration or submission procedure as may be required by the governmental authorities of his country of establishment or of the Territory, to ensure the validity, legality and enforceability of the Licence and this Contract."

4.1 Exclusive right to use the Licensed Technology

Licensor grants to Licensee, who accepts, an exclusive right and licence during the term of this Contract to use the Licensed Technology[7] in accordance with the terms of this Contract in order to manufacture, use and sell the Products in the Territory.[8]

> If any third-party proprietary rights are included in the Licensed Technology (e.g., because Licensor is using a patent of a third party for which it has obtained a license), such rights will need to be sublicensed (provided Licensor has the right to do so) or, where this is not possible, alternative solutions that do not infringe the patents that cannot be sublicensed must be found.

Licensor and Licensee agree that any software included in the Licensed Technology is being licensed by Licensor to Licensee for use in the Territory and pursuant to the conditions set forth in Annex 8.

Licensee has no right to sublicense the rights and licenses granted hereunder to any third party.

4.2 No trademark licence

> As explained in Section 4 of the Introduction, this model does not consider the option to grant Licensee the right to use Licensor's trademarks, since including the option to grant (or not to grant) a trademark licence would have implied the need to differentiate a number of further issues, which would have made the model too complex.

Any use of Licensor's trademarks in connection with the sale, distribution, marketing and promotion, if any, of Products shall be governed by a separate trademark licence agreement between the Parties. This Contract does not confer any right to use Licensor's trademarks. [9]

7 If the Parties wish to restrict the field of application they might add at the end: "…in connection with [field(s) of application], but not for [field(s) of application]."

8 The wording of this clause implies that Licensor grants an exclusive licence, not a so-called sole licence, where the licence is exclusive of all Parties but Licensor. If the Parties agree that the Licensor should instead grant a sole licence, they might add at the end: "… provided, however, that Licensor may use the Licensed Technology in order to make, use and sell the Products in the Territory." Parties should, however, bear in mind that this model has been drafted on the assumption that the licence would be exclusive.

9 The Parties might consider adding a clause prohibiting Licensee from registering any trademarks and/or relevant product names used in connection with the Products as trademarks and/or internet domain names.

Article 5
TERRITORY AND COMPETITION

5.1 Territorial Limitations

This clause contains two alternatives: alternative A for non-EU countries and alternative B for EU countries, in conformity with the Transfer of Technology Block Exemption Regulation 772/2004. Parties should be aware that Option B has been drafted on the assumption that Licensor and Licensee are not competitors and that neither of their market shares exceeds 30%. See Introduction, Section 6.

Option A	Option B
Licensee shall not sell the Products to customers established (i) outside the Territory or (ii) within the Territory and whom it knows (or should know, using ordinary diligence) may resell the Products outside the Territory. Licensee shall request all those to whom it sells the Products not to sell them outside the Territory. If Licensee receives an order from a prospective purchaser established outside the Territory, Licensee shall immediately refer that order to Licensor.	Licensee shall not, outside the Territory,[10] (i) actively promote sales of the Products, (ii) establish any distribution facilities, or (iii) effect any promotional activity directed to prospective purchasers. If Licensee receives unsolicited orders from purchasers established outside the Territory, Licensee shall be free to accept any such orders. Licensee shall, however, refuse unsolicited orders coming from prospective purchasers located in the Territory reserved by Licensor for itself or in territories for which Licensor has granted exclusive rights to other licensees. In this case, the limitation of passive sales towards the territories of other licensees shall last for the first two years that Licensee in question sells the Products in its Territory. [11]

10 It should be noted that the prohibition of active sales outside the Territory is admitted in general terms only for contracts where Licensor and Licensee are non-competitors (which has to be considered the normal situation in the context of this model. In cases where the Parties are competitors, limitations on active sales will be permitted only towards Licensor's territory and towards exclusive territories reserved to other licensees: see Article 4(1)(c)(v) of Regulation 772/2004.

11 See Article 4(2)(b)(ii) of Regulation 772/2004.

5.2 Non-Competition Obligation

During the term of this Contract, Licensee shall not engage in any negotiations or enter into a technology licence or similar agreement with third parties for the manufacture, distribution or sale of products that compete directly or indirectly with the Products.

Article 6

Obligation of Licensor

6.1 Provision of Know-how

Licensor shall provide to Licensee the Know-how owned by Licensor on the Commencement Date,[12] mainly through the supply of the Technical Documentation and the provision of training and technical assistance in conformity with this Contract.

A description of the Know-how is contained in Annex 5.

> Normally the Know-how need not be specified, since it will be included in the Technical Documentation and in the information transmitted orally through training and technical assistance. However, if the Parties need to show that qualified Know-how is secret, substantial and identified (e.g., for the purpose of complying with Article 1(1)(i) of EC Regulation 772/2004), they may provide a description of the Know-how in Annex 5 to make it possible for regulators to verify that it fulfils the criteria of secrecy and substantiality.
>
> If the Parties want to benefit from the protection granted by the TRIPS agreement, they may refer to the definition provided in Article 39 TRIPS.
>
> It may also be important to specify which Know-how is secret with respect to the confidentiality obligation under Article 15.1.

6.2 Provision of Technical Documentation

Licensor shall deliver the Technical Documentation to Licensee, according to the time schedule specified in Annex 4.

Unless otherwise agreed, the Technical Documentation shall be in English; all technical specifications shall be expressed according to the standards of measure and weight in use by Licensor.[13]

Documents shall be supplied in two sets. Any conversion into other languages, units of measure or standards is to be at Licensee's own expense and risk.

12 As regards the Know-how relating to further improvements to the Products, see the alternative solutions in Article 14.

13 Alternatively, Parties may provide that technical specifications should be expressed using a specific measurement system (e.g., the metric system).

6.3 Training and Technical Assistance

Licensor shall provide appropriate training and technical assistance to Licensee, as necessary to enable Licensee to acquire sufficient knowledge of the methods of manufacture, testing and use of the Products, as specified in Annex 9. Unless otherwise agreed, technical assistance shall be provided in English.

The employees or representatives of either Party, while on the premises of the other Party, shall be subject to the rules and regulations adopted by such other Party with respect to the conduct of its own employees or representatives to the extent these rules are reasonably acceptable.[14]

6.3.1 Training at Licensor's Premises

Licensor agrees at Licensee's request to train employees of Licensee in Licensor's plants on the manufacture of the Products.

The travel and living expenses and all other expenses for such employees shall be borne by Licensee.

The visits of Licensee's personnel for such training shall be limited to the number and qualifications of employees and duration of stay as specified in Annex 9-A.

Licensee shall advise Licensor in advance, in writing, of the names, interests, qualifications and expected length of stay of such personnel, in order to provide reasonable time to enable Licensor to arrange for such visit(s). Licensor shall have the right to postpone any such visit where it cannot provide adequate technical support to Licensee's personnel on the requested dates and shall allow the visit to be conducted as soon as the cause of the postponement has been remedied. In such cases, the Licensor shall inform Licensee, in writing, of such postponement reasonably in advance to the originally proposed date.

6.3.2 Training and Technical Assistance at Licensee's Premises

Licensor shall send at Licensee's request technical personnel to Licensee's premises to give advice and assistance in the manufacture of the Products. Such visits of Licensor's personnel shall be restricted to the number and qualifications of employees and duration of stay as specified in Annex 9-B.

The travel and living expenses of Licensor's personnel, as well as a daily fee, calculated according to Annex 9-B, shall be reimbursed by Licensee to Licensor upon receipt of Licensor's invoice.

6.4 Payment of Patent Fees

Licensor shall keep in force all Patents in the Territory relevant to the Products listed in Annex 3 and shall pay all fees and expenses in connection therewith promptly as such fees and expenses become due and payable.

14 The Parties might also wish to include an additional clause: "Each Party shall hold the other Party harmless from any responsibility for injuries to or death of its employees or representatives while visiting the other Party's facilities."

If patent protection is considered to be of major importance, the Parties might negotiate a right of first refusal under which Licensor shall offer Licensee the right to pursue any relevant patent applicant or Patent that Licensor wishes to discontinue.

.

6.5 Manufacturing Equipment

Parties may agree that Licensor shall supply such Manufacturing Equipment as is necessary for the manufacture of the Products according to Licensor's standards.

Where this is the case, the Manufacturing Equipment, its price, delivery and payment conditions shall be specified in Annex 7.

Article 7
Obligations of Licensee regarding manufacturing of Products

7.1 Manufacturing and Assembly of Products

Licensee shall manufacture (and assemble, as the case may be) the Products itself. If Licensee wishes to charge third parties with any or all of the manufacturing of the Products, it shall communicate the name of such third parties to Licensor and seek its prior consent, which Licensor shall not unreasonably withhold. Licensee must ensure that such third parties are at all times bound by the terms and conditions of this Contract.

Parties may wish to add further provisions on Licensor's right to control the manufacture, to access the manufacturing premises, to provide that the Products are to be manufactured in a specific plant or manufacture of Licensee and similar issues.

Licensee shall strictly follow the designs, drawings, specifications and indications furnished by Licensor with respect to the manufacture and assembly of the Products.[15]

15 For possible improvements or changes made by Licensee, see also Article 14.2.

7.2 Quality Standards

Licensee shall strictly observe Licensor's quality standard, for any Product manufactured and use in the manufacture and assembly of the Products equipment, tooling, materials and components that conform to such standards. Licensee shall furthermore establish and maintain such test and inspection procedures as are necessary to ensure the fulfilment of its obligations under this sub-section.

If any Product fails to meet the above-mentioned standards, Licensor shall assist Licensee in identifying the deficiencies and furnish to Licensee recommendations for correcting them. Where assistance is required in the Territory, Licensee shall pay the cost of the dispatch of technical personnel by Licensor.

Licensee shall not market or use any Products that fail to meet the above-mentioned quality standards without Licensor's prior consent.

> Parties may wish to provide for any certifications that Licensee's plant and manufacture may be required to obtain, such as with respect to ISO or DIN standards.

7.3 Audits

Licensor shall have the right to carry out, at its own expense, technical audits at Licensee's plants and offices, in order to check that Licensee is conforming to Licensor's standards in the manufacture of the Products and that the quality of the manufactured Products is satisfactory.[16]

7.4 Labelling of Products

> Parties should decide if they wish to give Licensee the possibility (or even oblige it) to mention that the Products are manufactured under a licence of Licensor and should choose the appropriate alternative in the clause hereunder.

Licensee [may/may not/shall] label any Product manufactured with a label in the form: "Manufactured by [Licensee] in [Territory] under a licence of [Licensor]".

16 In certain conditions, the Parties might feel the need to agree on working conditions (e.g., ILO minimum standards) or to make reference to local labour law. The Parties might therefore agree on an additional clause: "The Licensor and Licensee, in performing this Contract, shall comply with all relevant laws applicable to working conditions and safety at work and shall require their employees to respect these laws."

Article 8

Supply of Parts and Components and Products between the Parties

8.1 Licensor shall supply at the request of Licensee Parts and Components required by Licensee for the assembly or manufacture of the Products. Licensor shall not refuse such supply unreasonably.

8.2 The prices of such Parts and Components and the terms and conditions of sale to Licensee are specified in Annex 11. Such prices shall be fixed until the end of [insert year]. After such date, they may be modified by Licensor upon three months' written notice.

8.3 Subject to applicable mandatory law, Licensee hereby undertakes not to carry out any reverse engineering or attempt to seek protection, whether inside or outside of the Territory, in respect of any spare parts or components provided by the Licensor.

8.4 Licensor may purchase from Licensee the Products manufactured under licence at the price then currently paid by Licensee's customers. In such cases, the amounts payable as licence fees and/or royalties, according to Article 9 hereunder, may be set off against payments due by Licensor to Licensee.

Article 9

Payments

> Tax aspects should be considered prior to choosing the type of compensation (lump sum or royalties).

In exchange for the rights granted under this Contract, Licensee shall pay to Licensor the amounts indicated in sub-sections 9.1-9.3.

9.1 Lump Sum

Licensee shall pay the lump sum as specified in Annex 10-A.

9.2 Royalty

Licensee shall pay, for the duration of this Contract, the Royalty specified in Annex 10-B, calculated on the Net Sales Value of the Products sold by Licensee. The right of Licensor to receive the Royalty shall accrue at the moment the Products are sold.

The Royalty shall be calculated on a six-month basis and paid by Licensee to Licensor within 60 days from the end of each [six-month] period.

9.3 Minimum Royalty

Independent of the quantity of Products sold, Licensee shall pay to Licensor the minimum amount specified in Annex 10-C.

9.4 Statement of Royalty

Within 30 days following the end of each [six-month] period, Licensee shall provide Licensor with a complete and detailed statement of the Royalties accrued in the course of such period indicating the Net Sales Value and the quantity of Products sold. For the purpose of the above statement, Products shall be considered to be sold when invoiced or, if not invoiced, when [shipped/delivered]. Furthermore, Licensee shall provide Licensor with all additional information that it may reasonably require.

9.5 Licensor's Right to Verify

Licensor, through an independent auditing firm appointed by it, shall have free access to the accounts and any other documents of Licensee, in order to check such information as is necessary for verifying that the Royalty calculation made by Licensee is correct.

If, following such verification, it is found that the Royalty paid was more than five per cent (5%) less than the Royalty actually due for any [six-month] period, Licensor shall be entitled to reimbursement by Licensee for the cost of the relevant audit and to immediately terminate this Contract, informing Licensee by written notice.

9.6 Time of Payment – Delays

Any amount due by Licensee to Licensor shall not be considered as paid until it has been credited to the account indicated by Licensor, net and without any deduction whatsoever including any withholding or other taxes due in Licensee's country.

Any delay in payments by Licensee shall accrue interest, to be paid to Licensor, up to the actual date of payment. The interest shall be calculated at the official lending rate for immediate money of the central bank in the country where Licensor is headquartered, increased by five percentage points.[17]

17 The Parties might consider a different calculation method, depending on the law applicable to the contract or on the financial environment in which the contractual performance takes place.

Article 10

LICENSOR'S WARRANTIES

10.1 Licensed Technology Warranty

The issue dealt with in this clause is critical. On the one hand, Licensee would like Licensor to guarantee that the Licensed Technology will enable Licensee to manufacture the Products according to Licensor's quality standards. On the other hand, however, Licensor cannot give such a wide guarantee since the result depends in part upon conditions outside its control (e.g., local conditions, skills of Licensee's personnel, etc.). The clauses hereunder try to establish a reasonable compromise between the requirements of the Parties by presenting two alternative solutions.

A	B
Licensor warrants that it relies for the manufacturing of the Products on the Licensed Technology and that the Licensed Technology is complete and adequate to enable Licensor to manufacture the Products.	Licensor warrants that the Licensed Technology is complete and adequate to enable technicians skilled in the field to manufacture the Products according to Licensor's quality standards, provided all technical requirements are respected.

Should Licensee claim that the Licensed Technology is not complete or adequate, the Parties shall discuss the issue in good faith and seek a mutually satisfactory solution.

Licensor shall correct any material deficiencies in the Technical Documentation identified by Licensee within one year of receipt of the Technical Documentation by Licensee without undue delay after receipt of written notice by Licensee specifying the deficiencies, and thereafter provide Licensee with a corrected version of the deficient part of the Technical Documentation without undue delay.

10.2 Disclaimer of Other Warranties

Except for the warranty set forth in Article 10.1 above, Licensor makes no representation or warranty of any kind with respect to the Licensed Technology.

In particular, Licensor does not give any warranty or assume any responsibility or liability with respect to the ability of Licensee to market the Products successfully.

Article 11

LIMITATION OF LIABILITY FOR DAMAGES

Subject to mandatory provisions of law:

- The liability of each Party for damages shall be limited in the aggregate, i.e., for all damages in relation to this Contract, to an amount not to exceed [insert amount].
- In no event shall Licensor be liable for special, indirect, incidental or consequential damages, loss of profits and anticipated savings, loss of goodwill, loss of data or loss of use arising out of the manufacture, sale or supply of the Products, even if it has been advised of the possibility of such damages or losses.

Nothing contained in this Contract shall limit Licensor's liability for death or personal injury resulting from any act, omission or negligence of Licensor.[18]

Article 12

OWNERSHIP OF LICENSED TECHNOLOGY – THIRD-PARTY RIGHTS INFRINGEMENT

12.1 Ownership

Licensor confirms that it owns or controls the Licensed Technology as may be necessary.[19]

Without a prior written consent from Licensor, Licensee undertakes not to apply or attempt to register or obtain protection, in any country within or outside the boundaries of the Territory, for any right comprised under the scope of the Licensed Technology.

18 The Parties might agree on specific stipulations on insurance coverage, etc.

19 Depending on the alternatives chosen in Articles 10 and 11, the Parties might agree on an additional clause: "Licensor shall not be obliged to and shall not be liable for the patentability, maintenance and prosecution of the Patents and/or the secret nature of the Know-how."

12.2 Infringement claims by third parties

A	B
Licensor warrants that, as of the date of signature of this Contract, it has not received any notice of any claim of infringement of the Licensed Technology, that it has not received any notice of any claim of infringement of any third-party rights in relation to the Licensed Technology and that no action for any such infringement has been instituted against Licensor. To the best of Licensor's knowledge and belief at the date of signature of this Contract, there are no rights of third parties that could be infringed by the performance of this Contract by Licensee and that might detract from the value to Licensee of this Contract and there are no third-party infringers of the Patents. Licensor, however, cannot represent and warrant that such patents or other proprietary rights might not exist. In the event that the use of the Licensed Technology by Licensee in the context of this Contract may involve infringement of a third-party right, then the Parties shall consult together to agree upon the appropriate action to be taken.	Licensor, in compliance with and to the extent permitted by the applicable rules of procedure, shall defend, at its expense, any third-party action, suit or proceedings against Licensee ("Claim") to the extent that such Claim is based upon an allegation that the Licensed Technology or the Products infringe any intellectual property right in the Territory. Licensor shall indemnify Licensee for any judgments, settlements and reasonable attorney's fees resulting from a Claim. Licensor's obligations under this sub-section are conditioned on the following: (i) Licensee promptly notifies Licensor of the Claim in writing upon Licensee being made aware of the Claim; (ii) Licensee cooperates with Licensor in the defence or settlement of the Claim and gives Licensor, upon Licensor's request, sole authority and control over such defence; and (iii) Licensee provides all reasonable information and reasonable assistance requested by Licensor to handle the defence or settlement of the Claim. Licensor shall have no indemnity obligation for any Claim based on Products that Licensee has modified or combined with third-party products, provided the Claim would not exist but for such modification or combination. The foregoing states Licensor's entire liability and Licensee's sole and exclusive remedy with respect to any infringement of third-party intellectual property rights.

12.3 Indemnity By Licensee

Licensee shall defend and indemnify Licensor from and against any damages, liabilities, costs and expenses (including reasonable attorneys' fees and court costs) arising either out of: (i) the use of the Products by Licensee or its customers in an application or environment for which such Products were not designed or contemplated; or (ii) modifications of the Products by Licensee, provided, however, that: (a) Licensor shall have promptly provided Licensee with written notice thereof and reasonable cooperation, information and assistance in connection therewith; and (b) Licensee shall have sole control and authority with respect to the defence, settlement or compromise thereof.[20]

Article 13

Regulatory matters and product liability

13.1 Regulatory Matters

Licensee shall be responsible for obtaining regulatory approval, if required, in the Territory for the Products and shall own the regulatory approvals. Licensee shall comply with all commitments made in any application or similar filing regarding Licensee's manufacturing responsibilities as described herein.

Each Party shall provide reasonable assistance to the other, at no charge, to respond to regulatory audits, inspections, inquiries or requests concerning the Licensed Technology or the Products.

13.2 Product Safety And Product Liability

Each Party shall give the other prompt notice of any information it receives regarding the safety of Products, including any confirmed or unconfirmed information on adverse, serious or unexpected events associated with the use of the Products.

20 Alternative used in chemical industry: "Provided that Licensor has not breached any of the representations, warranties, covenants or obligations contained herein, Licensee agrees to indemnify and hold harmless Licensor and its affiliated companies, and their respective directors, officers, managing members, shareholders, partners, attorneys, accountants, agents, employees and consultants, and their respective heirs, successors and assigns, from and against any suits, claims, demands, liabilities, losses, expenses and damages, including loss of profits, and further including reasonable attorneys' fees and other legal expenses, of any kind or character arising from claims asserted by any third party against Licensor and due to or arising out of Licensee's practice or use of the Patents and/or the Know-how and/or in context with the manufacture, use, distribution, sale of the Products, including without limitation infringement of the rights of any third party, and product liability claims."

Article 14

FURTHER DEVELOPMENT, IMPROVEMENTS AND SUCCESSOR PRODUCTS

14.1 Modifications and/or Improvements of Products and/or Licensed Technology By Licensor

A	B
This Contract refers exclusively to the Products as they are when this Contract is entered into. Consequently, Licensor has no obligation to disclose to Licensee any modifications or improvements to the Products or to the Licensed Technology made after the date of signature of this Contract.	Licensor shall disclose to Licensee any improvements made to the Licensed Technology during the life of this Contract relating to the manufacture of the Products as well as possible modifications and improvements of the Products. The above shall extend to Successor Products, but not to new products, i.e., products replacing the Products but based on a new project or design.[21]

14.2 Modifications and/or Improvements of Products and/or Licensed Technology by Licensee

Licensee shall inform Licensor about any modifications and improvements of the Licensed Technology. If at any time during the term of this Contract Licensee wishes to make any modifications and improvements to the Products, Licensee must request the prior written consent of Licensor, which consent shall not be unreasonably withheld.

If a modification or improvement is made with Licensor's consent, any and all warranties given by Licensor with respect to the Product so modified or improved shall not extend to such modification or improvement.

Licensor shall have the right to use the modifications or improvements made by Licensee without additional payment and to sublicense them to other licensees, provided such licensees are willing to grant to Licensee the same right on modifications or improvements made by them.[22]

21 In view of Article 7.1, second para., above, Licensee is expected to use improvements disclosed by the Licensor. The Parties, however, may decide in a given case to which extent modifications need to be used by the Licensee.

22 If the Parties opt for the principle laid down in Article 14.1 A above, this paragraph might not result in a balanced solution and might need to be reviewed in the light of the applicable law.

Article 15
Confidential information – Force majeure – Hardship

15.1 The Parties shall be bound to confidentiality according to the ICC Confidentiality Clause 2006, which is incorporated by reference in this Contract.

15.2 The ICC Force Majeure Clause 2003 and ICC Hardship Clause 2003 are incorporated by reference in this Contract.

Article 16
Term and termination

16.1 Term of the Contract

This Contract shall enter into force according to Article 3 hereof and shall continue in full force and effect for an initial term until [insert date of expiry].

Upon expiration of this initial term ("Initial Term"), this Contract shall remain in force for consecutive terms of one year ("Renewal Term(s)"), unless either Party gives written notice of termination to the other Party at least three months prior to the end of the Initial Term or any Renewal Term.

16.2 Termination for Breach and Important Reason

Upon the occurrence of a material breach by a Party and the failure of such breaching Party to remedy said breach within 30 days of receiving written notice thereof from the non-breaching Party, this Contract may be terminated with immediate effect by the non-breaching Party by giving written notice of termination to the breaching Party.

16.3 Termination for Bankruptcy or Change of Control

Either Party shall have the right to terminate this Contract with immediate effect by giving written notice of termination in the case of:

(a) bankruptcy, moratorium, receivership, liquidation or any kind of arrangement between debtor and creditors of the other Party; or

> The above clause may not be effective in some jurisdictions, particularly when the law provides that the receiver is entitled to decide if the Contract will be terminated. If possible under the relevant applicable law, Licensee, in order to preserve its investments, may be interested in inserting a clause guaranteeing that the Contract will not be terminated in case of bankruptcy of Licensor.

(b) a change in control of either Party, if the controlling organization is reasonably not acceptable to the other Party and provided the Party subject to such change in control failed to pursue within 90 days of receiving written notice thereof from the other Party a remedy designed to cure the other Party's objections to such change in control.[23]

16.4 Effects of Termination

This sub-section answers the question whether Licensee should be entitled to use the Licensed Technology after the end of the Contract.

Alternative A provides that Licensee shall discontinue the use of the Licensed Technology unless Licensor was responsible for an earlier termination, in which case Licensee may continue using the Licensed Technology until the expiration of the then-current term of the Contract.

Alternative B is based on the assumption that Licensee is entitled to continue using the Licensed Technology after the end of the Contract. However, where Licensor has terminated the Contract before its expiry term for a reason for which Licensee is responsible, it provides that Licensee should discontinue using the Licensed Technology.

A	B
Upon expiration of this Contract in accordance with Article 16.1, termination by Licensor for breach by Licensee under to Article 16.2 or termination for bankruptcy or change of control regarding Licensee under Article 16.3, Licensee shall immediately cease any use or practice of the Licensed Technology and shall return to Licensor all confidential information received from Licensor. In the case of termination by Licensee for breach by Licensor under Article 16.2 or termination for bankruptcy or change of control regarding Licensor under Article 16.3, Licensee shall have the right to continue using the Licensed Technology until the final term of the Contract provided for under Article 16.1.	Upon expiration of this Contract in accordance with Article 16.1, termination by Licensee for breach by Licensor under Article 16.2 or termination for bankruptcy or change of control regarding Licensor under Article 16.3, Licensee shall have the right to continue using the Licensed Technology. In the case of termination by Licensor for breach by Licensee under Article 16.2 or termination for bankruptcy or change of control regarding Licensee under Article 16.3, Licensee shall immediately cease any use or practice of the Licensed Technology and shall return to Licensor all confidential information received from Licensor.

23 This clause may be applied in cases where Licensee ends up under the control of a competitor of Licensor, since in such cases Licensor may fear that confidential information will be passed to its competitor.

16.5 Cooling Off

In all cases where Licensee must cease the use or practice of the Licensed Technology under Article 16.4, Licensee shall nevertheless have the right:

(1) to continue using the Licensed Technology with respect to the manufacture or assembly of Products that, at the date of expiration or termination of this Contract, were already in the course of manufacture or for which Licensee had received orders or binding offers, provided Licensee notifies Licensor within 15 days following the date of termination or expiration the exact amount of the Products in the course of manufacture and the orders or binding offers received; and

(2) for a period of [...] years after the date of termination or expiration, to service and install Products sold by Licensee.

Article 17

Resolution of disputes

17.1 In the event of any dispute arising out of or in connection with the Contract, the Parties shall submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a request for alternative dispute resolution, or within such other period as the Parties may agree in writing, such dispute shall be finally settled in accordance with Article 17.2 hereunder.[24]

17.2

A Arbitration	B Litigation (ordinary courts)
All disputes arising out of or in connection with this Contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The place of arbitration shall be ………… (place). The language of the arbitration shall be English.	In case of dispute, the courts of ………… (place) ………… (country) shall have exclusive jurisdiction.

24 Where Parties choose Option B in Article 18 (Applicable Law), they are advised to consider any time bars under the chosen national law regarding the dispute resolution mechanism chosen in Article 17.2.

Article 18

APPLICABLE LAW

A	B
Unless otherwise agreed, any questions relating to this Contract which are not expressly or implicitly settled by the provisions contained in this Contract shall be governed, in the following order, by: (a) the principles of law generally recognized in international trade as applicable to international transfer of technology contracts; (b) relevant trade usages; and (c) the Unidroit Principles of International Commercial Contracts.	This Contract shall be governed by the laws of .... (country).[25]

If the Contract is submitted to a law other than that of Licensee's (or Licensor's) country, Parties should check whether mandatory rules of such country may nevertheless be applicable. See Introduction, Section 9.

25 Before choosing the law of a given country, Parties should check if the provisions of this model contract conform with such law. As technology transfer agreements often stretch over very long periods of time, the Parties might agree on an additional provision that "freezes" such law in its current state

Article 19
TAXES [26]

A	B
If any payments made by Licensee under this Contract are subject to withholding tax, Licensee may withhold the applicable withholding tax from the relevant payment and remit the balance to Licensor, provided Licensee supplies Licensor with original documentation evidencing the appropriate payment by Licensee of that withholding tax immediately following each such remittance.	In the event that any non-refundable withholding or similar tax(es) are due in respect of any royalty or other payments under this Contract, the amount of such payments shall be grossed up such that Licensor shall receive the same amount of royalty or such other payment as if such withholding or similar tax(es) had not been applied.

Article 20
MISCELLANEOUS

20.1 The English text of this Contract is the only one to be considered as original.

20.2 Recitals and Annexes to this Contract form an integral part of it.

20.3 This Contract supersedes all previous understandings, whether oral or in writing, between the Parties on the same subject.

20.4 Any amendment to this Contract shall be in writing.

20.5 This Contract cannot be assigned or transferred by any Party in whole or in part without the previous written consent of the other. However, where a Party requests the other Party to be permitted to assign the Contract to a parent company, the other Party shall not unreasonably refuse consent, provided it receives adequate warranties as to the correct performance of this Contract by the assignee.

> The Parties might agree on an additional "affiliate" exemption, under which such a restriction would not apply in the case of an assignment or transfer to an affiliate company, provided the assigning Party provides adequate guarantees.

26 See also Introduction, Section 12: 'Tax issues', above.

20.6 Any provision to be found invalid or unenforceable shall not affect the validity of the Contract as a whole. The Parties undertake in good faith to replace the invalid provisions with valid provisions having equivalent or similar content.

20.7 All notices or other communications given pursuant to this Contract shall be in writing in English, effective upon receipt and delivered by: (i) certified or registered airmail with postage prepaid; (ii) facsimile or cable communications; or (iii) hand. Such communications shall be deemed given and received upon dispatch or hand delivery if sent by telex, cable or personal delivery, or within five (5) days of mailing, if sent by certified or registered airmail, and shall be addressed as follows:

If to Licensor: [address]

Telephone: ………… Facsimile: …………

If to Licensee: [address]

Telephone: ………… Facsimile: …………

or to such other address the Party concerned may thereafter give to the other Party in writing.

20.8 If the Parties have not made a choice between the alternative solutions provided in Article 5, alternative A shall apply if Licensee is established outside the European Union and alternative B shall apply if Licensee is established within the European Union.

20.9 If the Parties have not made a choice between the alternative solutions provided in Articles 10.1, 12.2, 14.1, 16.4, 17.2, 18 and/or 19, alternative A shall apply.

Done in ………… (place), on ………… (date)

(the Licensor) (the Licensee)

ANNEX 1

PRODUCTS

The products for which this licence is granted are the following:

…………………………

…………………………

…………………………

ANNEX 2

EVENTS TO OCCUR BEFORE THE COMMENCEMENT DATE

The Parties agree that the following events must occur before the Commencement Date as defined in Article 3.

- ☐ **Payments by Licensee:**
  - ☐ Receipt by Licensor in its bank account of an advance payment of …………
  - ☐ Notification of issuance of a documentary credit, confirmed by …………, for …………
  - ☐ Other:…………………………

- ☐ **Official authorizations:**
  - ☐ Authorization of the Contract by …………………………
  - ☐ Other: …………………………

- ☐ **Securities by Licensor:**
  - ☐ Advance payment guarantee

- ☐ **Other:**

  …………………………

  …………………………

ANNEX 3

PATENTS

The grant of the licence under this Contract includes the right to use the following patents, which are part of the Licensed Technology.

1.			
2.			
3.			
...			
...			

41

ANNEX 4

TECHNICAL DOCUMENTATION

Technical Documentation

Licensor shall supply to Licensee, within 60 days of the Commencement Date, the following technical documentation relating to the design and manufacture of the Products:

…………

…………

…………

> The Technical Documentation may comprise a great variety of items, such as, for instance, designs and specifications of the licensed Products, manufacturing instructions, manufacturing drawings, specifications of raw materials and/or semi-finished products, process documentation, operation manuals, etc.
>
> Parties should exercise diligence in defining the documentation to be supplied.
>
> Parties may decide that part of the documentation shall be forwarded at a later stage. This will typically be the case where there is a gradual transfer of the technology (e.g., assembly during the initial stage, manufacture of basic parts during the second stage and manufacture of the whole product during the final stage).

ANNEX 5

DESCRIPTION OF THE KNOW-HOW

The Know-how to be provided to Licensee under this Contract consists mainly of the following:

5-A Manufacturing process Know-how

…………

5-B Product Know-how

…………

5-C Other Know-how

…………

ANNEX 6

DEFINITION OF THE CONTRACTUAL TERRITORY

The Territory for which this licence is granted is the following:

…………………………

> Parties may also make a distinction between the territory in which Licensee has the right to manufacture the products and the (normally wider) territory where it may sell the Products. In some cases, part of the sales Territory may be non-exclusive.

ANNEX 7

MANUFACTURING EQUIPMENT

If Licensor is to supply manufacturing equipment, this Annex should identify the equipment, price, delivery date, payment conditions, etc.

Parties may prefer to conclude a separate agreement for the sale of the manufacturing equipment, in which case the equipment will not be included in the price of the transfer of technology contract.

ANNEX 8

CONDITIONS FOR SUPPLY OF SOFTWARE AND COMPUTER PROGRAMS

1. Delivery of the software

The software will be delivered in machine-readable form only. The software is considered to have been delivered when the data carrier and the documentation are dispatched from the premises of Licensor or, if no data carriers are delivered, when the program is transferred into Licensee's system. Supporting services by Licensor during installation of the computer software are to be agreed upon separately.

2. Maintenance

The maintenance of the software by Licensor covers the following services free of charge:

2.1 Delivery of the latest version released by Licensor.

2.2 Remedy of defects in the current version run on Licensor's system.

3. Agreement for the supply of software

Licensor may request that part or all of the software to be made available under the present Contract be the subject of a separate agreement for the supply of software between the Parties for the purpose of defining the specific additional rights and obligations between the Parties with respect to such software.

Licensee may not sublicense to third parties any rights or licenses to use such software or computer programs.

Licensor shall retain title to all of such software and computer programs.

ANNEX 9

TRAINING AND TECHNICAL ASSISTANCE

9-A Training at Licensor's premises

Number and qualifications of Licensee's personnel to be trained:

…………………………

…………………………

Duration of stay:

…………………………

…………………………

9-B Training and technical assistance at Licensee's premises

> If the dispatch of technical personnel by Licensor is included in the Contract price, Parties should clearly specify the number and qualifications of such personnel as well the duration of their stay. If, on the contrary, such personnel are to be paid separately, Parties may agree their number and duration of stay at a later stage, according to Licensee's needs.

Number and qualifications of Licensor's personnel sent to Licensee's premises:

…………………………

…………………………

Duration of stay:

…………………………

…………………………

Daily fee for Licensor' personnel: [27]

…………………………

…………………………

27 To be applied when the dispatch of personnel is not included in the Contract price or where the request for technical assistance exceeds the agreed figures.

ANNEX 10

PAYMENTS

10-A Lump Sum

Licensee shall pay to Licensor a lump sum amounting to ……….. on [insert due date].

> The lump sum may also be divided into several instalments; for example, the first instalment at the contract signature, the second when the Technical Documentation has been delivered and the third when the manufacture of the Products starts.

10-B Royalty

The Royalty is … %.

> The Parties may agree upon amounts that increase (or decrease) during the term of the Contract or with respect to the quantity of Products sold.

10-C Minimum Royalty

The Minimum Royalty amounts to ……….. for each [six-month] period.

ANNEX 11

SUPPLY OF PARTS AND COMPONENTS

APPENDIX

APPENDIX 1

Commission Regulation (EC) No 772/2004

of 27 April 2004

on the application of Article 81(3) of the Treaty to categories of technology transfer agreements

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices[(1)], and in particular Article 1 thereof,

Having published a draft of this Regulation[(2)],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of technology transfer agreements and corresponding concerted practices to which only two undertakings are party which fall within Article 81(1).

(2) Pursuant to Regulation No 19/65/EEC, the Commission has, in particular, adopted Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements[(3)].

---

(1) OJ 36, 6.3.1965, p. 533/65. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

(2) OJ C 235, 1.10.2003, p. 10.

(3) OJ L 31, 9.2.1996, p. 2. Regulation as amended by the 2003 Act of Accession.

(3) On 20 December 2001 the Commission published an evaluation report on the transfer of technology block exemption Regulation (EC) No 240/96[4]. This generated a public debate on the application of Regulation (EC) No 240/96 and on the application in general of Article 81(1) and (3) of the Treaty to technology transfer agreements. The response to the evaluation report from Member States and third parties has been generally in favour of reform of Community competition policy on technology transfer agreements. It is therefore appropriate to repeal Regulation (EC) No 240/96.

(4) This Regulation should meet the two requirements of ensuring effective competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need to simplify the regulatory framework and its application. It is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics-based approach which assesses the impact of agreements on the relevant market. It is also consistent with such an approach to make a distinction between agreements between competitors and agreements between non-competitors.

(5) Technology transfer agreements concern the licensing of technology. Such agreements will usually improve economic efficiency and be pro-competitive as they can reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.

(6) The likelihood that such efficiency-enhancing and pro-competitive effects will outweigh any anti-competitive effects due to restrictions contained in technology transfer agreements depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from undertakings owning substitute technologies or undertakings producing substitute products.

(7) This Regulation should only deal with agreements where the licensor permits the licensee to exploit the licensed technology, possibly after further research and development by the licensee, for the production of goods or services. It should not deal with licensing agreements for the purpose of subcontracting research and development. It should also not deal with licensing agreements to set up technology pools, that is to say, agreements for the pooling of technologies with the purpose of licensing the created package of intellectual property rights to third parties.

(8) For the application of Article 81(3) by regulation, it is not necessary to define those technology transfer agreements that are capable of falling within Article 81(1). In the individual assessment of agreements pursuant to Article 81(1), account has to be taken of several factors, and in particular the structure and the dynamics of the relevant technology and product markets.

(4) COM(2001) 786 final.

(9) The benefit of the block exemption established by this Regulation should be limited to those agreements which can be assumed with sufficient certainty to satisfy the conditions of Article 81(3). In order to attain the benefits and objectives of technology transfer, the benefit of this Regulation should also apply to provisions contained in technology transfer agreements that do not constitute the primary object of such agreements, but are directly related to the application of the licensed technology.

(10) For technology transfer agreements between competitors it can be presumed that, where the combined share of the relevant markets accounted for by the parties does not exceed 20 % and the agreements do not contain certain severely anti-competitive restraints, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.

(11) For technology transfer agreements between non-competitors it can be presumed that, where the individual share of the relevant markets accounted for by each of the parties does not exceed 30 % and the agreements do not contain certain severely anti-competitive restraints, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.

(12) There can be no presumption that above these market-share thresholds technology transfer agreements do fall within the scope of Article 81(1). For instance, an exclusive licensing agreement between non-competing undertakings does often not fall within the scope of Article 81(1). There can also be no presumption that, above these market-share thresholds, technology transfer agreements falling within the scope of Article 81(1) will not satisfy the conditions for exemption. However, it can also not be presumed that they will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.

(13) This Regulation should not exempt technology transfer agreements containing restrictions which are not indispensable to the improvement of production or distribution. In particular, technology transfer agreements containing certain severely anti-competitive restraints such as the fixing of prices charged to third parties should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market shares of the undertakings concerned. In the case of such hardcore restrictions the whole agreement should be excluded from the benefit of the block exemption.

(14) In order to protect incentives to innovate and the appropriate application of intellectual property rights, certain restrictions should be excluded from the block exemption. In particular exclusive grant back obligations for severable improvements should be excluded. Where such a restriction is included in a licence agreement only the restriction in question should be excluded from the benefit of the block exemption.

(15) The market-share thresholds, the non-exemption of technology transfer agreements containing severely anti-competitive restraints and the excluded restrictions provided for in this Regulation will normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.

(16) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3), the Commission should be able to withdraw the benefit of the block exemption. This may occur in particular where the incentives to innovate are reduced or where access to markets is hindered.

(17) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[5] empowers the competent authorities of Member States to withdraw the benefit of the block exemption in respect of technology transfer agreements having effects incompatible with Article 81(3), where such effects are felt in their respective territory, or in a part thereof, and where such territory has the characteristics of a distinct geographic market. Member States must ensure that the exercise of this power of withdrawal does not prejudice the uniform application throughout the common market of the Community competition rules or the full effect of the measures adopted in implementation of those rules.

(18) In order to strengthen supervision of parallel networks of technology transfer agreements which have similar restrictive effects and which cover more than 50 % of a given market, the Commission should be able to declare this Regulation inapplicable to technology transfer agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 81 to such agreements.

(19) This Regulation should cover only technology transfer agreements between a licensor and a licensee. It should cover such agreements even if conditions are stipulated for more than one level of trade, by, for instance, requiring the licensee to set up a particular distribution system and specifying the obligations the licensee must or may impose on resellers of the products produced under the licence. However, such conditions and obligations should comply with the competition rules applicable to supply and distribution agreements. Supply and Distribution agreements concluded between a licensee and its buyers should not be exempted by this Regulation.

(20) This Regulation is without prejudice to the application of Article 82 of the Treaty,

HAS ADOPTED THIS REGULATION:

(5) OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

Article 1

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

(a) “agreement” means an agreement, a decision of an association of undertakings or a concerted practice;

(b) “technology transfer agreement” means a patent licensing agreement, a know-how licensing agreement, a software copyright licensing agreement or a mixed patent, know-how or software copyright licensing agreement, including any such agreement containing provisions which relate to the sale and purchase of products or which relate to the licensing of other intellectual property rights or the assignment of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the production of the contract products; assignments of patents, know-how, software copyright or a combination thereof where part of the risk associated with the exploitation of the technology remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent on the turnover obtained by the assignee in respect of products produced with the assigned technology, the quantity of such products produced or the number of operations carried out employing the technology, shall also be deemed to be technology transfer agreements;

(c) “reciprocal agreement” means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or software copyright licence and where these licenses concern competing technologies or can be used for the production of competing products;

(d) “non-reciprocal agreement” means a technology transfer agreement where one undertaking grants another undertaking a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or software copyright licence, or where two undertakings grant each other such a licence but where these licenses do not concern competing technologies and cannot be used for the production of competing products;

(e) “product” means a good or a service, including both intermediary goods and services and final goods and services;

(f) “contract products” means products produced with the licensed technology;

(g) “intellectual property rights” includes industrial property rights, know-how, copyright and neighbouring rights;

(h) “patents” means patents, patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates;

(i) “know-how" means a package of non-patented practical information, resulting from experience and testing, which is:

(i) secret, that is to say, not generally known or easily accessible,

(ii) substantial, that is to say, significant and useful for the production of the contract products, and

(iii) identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(j) competing undertakings" means undertakings which compete on the relevant technology market and/or the relevant product market, that is to say:

(i) competing undertakings on the relevant technology market, being undertakings which license out competing technologies without infringing each others' intellectual property rights (actual competitors on the technology market); the relevant technology market includes technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use,

(ii) competing undertakings on the relevant product market, being undertakings which, in the absence of the technology transfer agreement, are both active on the relevant product and geographic market(s) on which the contract products are sold without infringing each others' intellectual property rights (actual competitors on the product market) or would, on realistic grounds, undertake the necessary additional investments or other necessary switching costs so that they could timely enter, without infringing each others' intellectual property rights, the(se) relevant product and geographic market(s) in response to a small and permanent increase in relative prices (potential competitors on the product market); the relevant product market comprises products which are regarded by the buyers as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices and their intended use;

(k) “selective distribution system” means a distribution system where the licensor undertakes to license the production of the contract products only to licensees selected on the basis of specified criteria and where these licensees undertake not to sell the contract products to unauthorised distributors;

(l) “exclusive territory” means a territory in which only one undertaking is allowed to produce the contract products with the licensed technology, without prejudice to the possibility of allowing within that territory another licensee to produce the contract products only for a particular customer where this second licence was granted in order to create an alternative source of supply for that customer;

(m) “exclusive customer group” means a group of customers to which only one undertaking is allowed actively to sell the contract products produced with the licensed technology;

(n) “severable improvement" means an improvement that can be exploited without infringing the licensed technology.

2. The terms "undertaking", "licensor" and "licensee" shall include their respective connected undertakings.

“Connected undertakings” means:

(a) undertakings in which a party to the agreement, directly or indirectly:

(i) has the power to exercise more than half the voting rights, or

(ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

(iii) has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

(i) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or

(ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

Article 2

Exemption

Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to technology transfer agreements entered into between two undertakings permitting the production of contract products.

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 81(1). The exemption shall apply for as long as the intellectual property right in the licensed technology has not expired, lapsed or been declared invalid or, in the case of know-how, for as long as the know-how remains secret, except in the event where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption shall apply for the duration of the agreement.

Article 3

Market-share thresholds

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on the affected relevant technology and product market.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall apply on condition that the market share of each of the parties does not exceed 30 % on the affected relevant technology and product market.

3. For the purposes of paragraphs 1 and 2, the market share of a party on the relevant technology market(s) is defined in terms of the presence of the licensed technology on the relevant product market(s). A licensor's market share on the relevant technology market shall be the combined market share on the relevant product market of the contract products produced by the licensor and its licensees.

Article 4

Hardcore restrictions

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of a party's ability to determine its prices when selling products to third parties;

(b) the limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;

(c) the allocation of markets or customers except:

(i) the obligation on the licensee(s) to produce with the licensed technology only within one or more technical fields of use or one or more product markets,

(ii) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology within one or more technical fields of use or one or more product markets or one or more exclusive territories reserved for the other party,

(iii) the obligation on the licensor not to license the technology to another licensee in a particular territory,

(iv) the restriction, in a non-reciprocal agreement, of active and/or passive sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party,

(v) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence,

(vi) the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,

(vii) the obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;

(d) the restriction of the licensee's ability to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:

(i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor,

(ii) the restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group,

(iii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,

(iv) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer,

(v) the restriction of sales to end-users by a licensee operating at the wholesale level of trade,

(vi) the restriction of sales to unauthorised distributors by the members of a selective distribution system;

(c) the restriction of active or passive sales to end-users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

3. Where the undertakings party to the agreement are not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, paragraph 2 and not paragraph 1 shall apply for the full life of the agreement unless the agreement is subsequently amended in any material respect.

Article 5

Excluded restrictions

1. The exemption provided for in Article 2 shall not apply to any of the following obligations contained in technology transfer agreements:

   (a) any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor or to a third party designated by the licensor in respect of its own severable improvements to or its own new applications of the licensed technology;

   (b) any direct or indirect obligation on the licensee to assign, in whole or in part, to the licensor or to a third party designated by the licensor, rights to its own severable improvements to or its own new applications of the licensed technology;

   (c) any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights which the licensor holds in the common market, without prejudice to the possibility of providing for termination of the technology transfer agreement in the event that the licensee challenges the validity of one or more of the licensed intellectual property rights.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to any direct or indirect obligation limiting the licensee's ability to exploit its own technology or limiting the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

Article 6

Withdrawal in individual cases

1. The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Regulation (EC) No 1/2003, where it finds in any particular case that a technology transfer agreement to which the exemption provided for in Article 2 applies nevertheless has effects which are incompatible with Article 81(3) of the Treaty, and in particular where:

   (a) access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third parties' technologies;

   (b) access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensors from licensing to other licensees;

(c) without any objectively valid reason, the parties do not exploit the licensed technology.

2. Where, in any particular case, a technology transfer agreement to which the exemption provided for in Article 2 applies has effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of this Regulation, pursuant to Article 29(2) of Regulation (EC) No 1/2003, in respect of that territory, under the same circumstances as those set out in paragraph 1 of this Article.

Article 7

Non-application of this Regulation

1. Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar technology transfer agreements cover more than 50 % of a relevant market, this Regulation is not to apply to technology transfer agreements containing specific restraints relating to that market.

2. A regulation pursuant to paragraph 1 shall not become applicable earlier than six months following its adoption.

Article 8

Application of the market-share thresholds

1. For the purposes of applying the market-share thresholds provided for in Article 3 the rules set out in this paragraph shall apply.

   The market share shall be calculated on the basis of market sales value data. If market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned.

   The market share shall be calculated on the basis of data relating to the preceding calendar year.

   The market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

2. If the market share referred to in Article 3(1) or (2) is initially not more than 20 % respectively 30 % but subsequently rises above those levels, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold or 30 % threshold was first exceeded.

Article 9

Repeal

Regulation (EC) No 240/96 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation.

Article 10

Transitional period

The prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 May 2004 to 31 March 2006 in respect of agreements already in force on 30 April 2004 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 30 April 2004, satisfied the conditions for exemption provided for in Regulation (EC) No 240/96.

Article 11

Period of validity

This Regulation shall enter into force on 1 May 2004.

It shall expire on 30 April 2014.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

APPENDIX 2
ICC FORCE MAJEURE CLAUSE 2003*

This clause, known as the "ICC Force Majeure Clause 2003", is intended to apply to any contract which incorporates it either expressly or by reference. While parties are encouraged to incorporate the Clause into their contracts by its full name, it is anticipated that any reference in a contract to the 'ICC Force Majeure Clause' shall, in the absence of evidence to the contrary, be deemed to be a reference to this Clause.

The general structure of the Clause is to provide contracting parties both with a general force majeure formula and with an off-the-peg list of force majeure events. The ICC Task Force on Force Majeure and Hardship discussed at length the respective merits of three options open to it. The first was simply to draft a general force majeure formula, as do the main international instruments to which the Task Force had regard, namely the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Principles of European Contract Law, and the Unidroit Principles for International Commercial Contracts. The second was to draft a general force majeure formula and to provide a merely illustrative list of force majeure events, as does the previous 1985 ICC Force Majeure Clause. The third was to draft both a general force majeure formula and to provide a list of events the occurrence of which altered the evidential balance in favour of the party invoking the clause. The ICC Task Force on Force Majeure and Hardship has decided to draft the clause on the basis of the third option and this because of the three purposes on which the Clause is based. These three purposes are set out below.

First, it is intended that the new clause should assist the largest possible number of users: those who draft neither of such two types of such clauses in their own contracts; those who draft only a general formula but would also like the predictability of an agreed list of events; and finally those who draft only a list of specified events but who wish to invoke an unlisted event as a force majeure event.

Secondly, it is intended to give the list of events a function which goes beyond the merely illustrative, such that a party would find it easier to invoke the clause if it could point towards one of the listed events than if it could only use the general force majeure formula.

Thirdly and on the other hand, it was important not to afford a party invoking a listed event too much protection: it was definitely regarded as wrong for such a party simply to point towards the mere occurrence of a listed event, the effects of which it could reasonably have avoided or overcome, and to claim relief on that basis from its duty to perform.

The Clause seeks to attain these purposes first by providing a general force majeure formula placing the burden of proving the requirements for the application of the clause on the party invoking it. The Clause also provides a list of force majeure events, however, which is subject to the same conditions as established for the general force majeure formula but with evidential advantages for a party invoking the clause through this route. It should be emphasised that even where a party invoking the clause does so by pointing towards a listed event, that party still needs to prove that it could not reasonably have avoided or overcome the effects of the listed event.

1. Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves:
   - (a) that its failure to perform was caused by an impediment beyond its reasonable control; and
   - (b) that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and
   - (c) that it could not reasonably have avoided or overcome the effects of the impediment.
2. Where a contracting party fails to perform one or more of its contractual duties because of default by a third party whom it has engaged to perform the whole or part of the contract, the consequences set out in paragraphs 4 to 9 of this Clause will only apply to the contracting party:
   - (a) if and to the extent that the contracting party establishes the requirements set out in paragraph 1 of this Clause; and
   - (b) if and to the extent that the contracting party proves that the same requirements apply to the third party.
3. In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1(a) and (b) of this Clause in case of the occurrence of one or more of the following impediments:
   - (a) war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation;
   - (b) civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;
   - (c) act of terrorism, sabotage or piracy;
   - (d) act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;
   - (e) act of God, plague, epidemic, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;
   - (f) explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;
   - (g) general labour disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises.

* *ICC Force Majeure Clause and ICC Hardship Clause* – ICC Publication No. 650
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4. A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from its duty to perform its obligations under the contract from the time at which the impediment causes the failure to perform if notice thereof is given without delay or, if notice thereof is not given without delay, from the time at which notice thereof reaches the other party.

5. A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from any liability in damages or any other contractual remedy for breach of contract from the time indicated in paragraph 4.

6. Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraphs 4 and 5 above shall apply only insofar, to the extent that and as long as the impediment or the listed event invoked impedes performance by the party invoking this Clause of its contractual duties. Where this paragraph applies, the party invoking this Clause is under an obligation to notify the other party as soon as the impediment or listed event ceases to impede performance of its contractual duties.

7. A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon performance of its contractual duties.

8. Where the duration of the impediment invoked under paragraph 1 of this Clause or of the listed event invoked under paragraph 3 of this Clause has the effect of substantially depriving either or both of the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party.

9. Where paragraph 8 above applies and where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay to the other party a sum of money equivalent to the value of such benefit.

APPENDIX 3
ICC HARSHIP CLAUSE 2003

This clause, known as the "ICC Hardship Clause 2003", is intended to apply to any contract which incorporates it either expressly or by reference. While parties are encouraged to incorporate the clause into their contracts by its full name, it is anticipated that any reference in a contract to the "ICC Hardship Clause" shall, in the absence of evidence to the contrary, be deemed to be a reference to this clause.

1. A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

   a. the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that

   b. it could not reasonably have avoided or overcome the event or its consequences,

   the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reason-ably allow for the consequences of the event.

3. Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.

APPENDIX 4
ICC CONFIDENTIALITY CLAUSE 2006

This clause, known as the "ICC Confidentiality Clause 2006", is intended to apply to any contract that incorporates it either expressly or by reference. While parties are encouraged to incorporate the Clause into their contracts by its full name, it is anticipated that any reference in a contract to the "ICC Confidentiality Clause" shall, in the absence of evidence to the contrary, be deemed to be a reference to this Clause.

1.1 "Agreement" means the contract incorporating this Clause.

"Purpose" means the purpose of the Agreement.

"Disclosing Party" means the Party disclosing Confidential Information to the Receiving Party.

"Permitted Recipients" means any director, officer, employee, adviser or auditor of the Receiving Party or any of its Related Companies who reasonably needs to know Confidential Information for the Purpose.

"Receiving Party" means the Party receiving Confidential Information from the Disclosing Party.

"Related Company" means any corporation, company or other entity that controls, or is controlled by, one Party or by another Related Company of that Party, where control means ownership or control, direct or indirect, of more than fifty (50) per cent of that corporation's, company's or other entity's voting capital.

"Confidential Information"[1] means any information or data, or both, communicated by or on behalf of the Disclosing Party to the Receiving Party, including, but not limited to, any kind of business, commercial or technical information and data in connection with the Purpose, except for such information that is demonstrably non-confidential in nature. The information shall be Confidential Information, irrespective of the medium in which that information or data is embedded, and whether the Confidential Information is disclosed orally, visually or otherwise.

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1 Please be aware that the ICC Confidentiality Clause adopts the default option A for definition of Confidential Information from the ICC Model Confidentiality Agreement. The Parties may consider using the alternative option B:

"Confidential Information" means any information or data, or both, communicated by or on behalf of the Disclosing Party to the Receiving Party, including, but not limited to, any kind of business, commercial or technical information and data disclosed between the Parties in connection with the Purpose provided that:

a) when disclosed in tangible form or via electronic communication it is marked or otherwise identified as "Confidential" by the Disclosing Party; or

b) when disclosed orally or visually it is identified as "Confidential" prior to disclosure and subsequently summarized in writing by the Disclosing Party and such summary is given to the Receiving Party marked or otherwise identified as "Confidential" within thirty (30) days after that disclosure. In case of disagreement relating to the summary, the Receiving Party must present its objections to the summary in writing within thirty (30) days of receipt.

Confidential Information shall include any copies or abstracts made of it as well as any products, apparatus, modules, samples, prototypes or parts that may contain or reveal the Confidential Information.

Confidential Information is limited to information disclosed on or after the date of signature of this Agreement.

1.2 The Receiving Party shall:

a) not disclose any Confidential Information to anyone except to the Permitted Recipients, who are bound to the same level of confidentiality obligations as set forth by this Clause;

b) use any Confidential Information exclusively for the Purpose; and

c) keep confidential and hold all Confidential Information with no less a degree of care as is used for the Receiving Party's own confidential information and at least with reasonable care.

1.3 Any obligation to keep confidential all Confidential Information shall not apply to the extent that the Receiving Party can prove that any of that information:

a) was in the Receiving Party's possession without an obligation of confidentiality prior to receipt from the Disclosing Party;

b) is at the time of disclosure, or subsequently becomes, generally available to the public through no breach of this Agreement by the Receiving Party or any Permitted Recipient;

c) is lawfully obtained by the Receiving Party from a third party without an obligation of confidentiality, provided that third party is not, to the Receiving Party's best knowledge, in breach of any obligation of confidentiality to the Disclosing Party relating to that information; or

d) is developed by the Receiving Party or its Related Companies independent of any Confidential Information.

1.4 Unless otherwise specified by the Disclosing Party at the time of disclosure, the Receiving Party may make copies of the Confidential Information to the extent necessary for the Purpose.

1.5 Nothing in this Agreement shall obligate either Party to disclose any information.

Each Party has the right to refuse to accept any information under this Agreement prior to any disclosure. Confidential Information disclosed despite an express prior refusal is not covered by the obligations under this Clause.

1.6 Nothing in this Agreement shall affect any rights the Disclosing Party may have in relation to the Confidential Information, neither shall this Agreement provide the Receiving Party with any right or licence under any patents, copyrights, trade secrets, or the like in relation to the Confidential Information, except for the use of Confidential Information in connection with the Purpose and in accordance with this Clause.

1.7 The Disclosing Party makes available the Confidential Information as is and does not warrant that any of this information that it discloses is complete, accurate, free from defects or third party rights, or useful for the Purpose or other purposes of the Receiving Party.

1.8 This Clause does not:

a) create any other relationship between the Parties;

b) oblige a Party to enter into any other contract; or

c) require consideration for any information received.

1.9 In addition to any remedies under the applicable law,[2] the Parties recognize that any breach or violation of any provision of this Clause may cause irreparable harm to the other Party, which money damages may not necessarily remedy. Therefore, upon any actual or impending violation of any provision of this Clause, either Party may obtain from any court of competent jurisdiction a preliminary, temporary or permanent injunction, restraining or enjoining such violation by the other Party or any entity or person acting in concert with that Party.

1.10 Within ninety (90) days of termination of this Agreement, the Disclosing Party may request the disposal of the Confidential Information. Disposal means execution of reasonable measures to return or destroy all copies including electronic data. Destruction shall be confirmed in writing. Disposal shall be effected within thirty (30) days of the request being made.[3]

The provisions for disposal shall not apply to copies of electronically communicated Confidential Information made as a matter of routine information technology back-up and to Confidential Information or copies of it that must be stored by the Receiving Party or its advisers according to provisions of mandatory law, provided that this Confidential Information or copies of it shall be subject to continuing obligations of confidentiality under this Agreement; but no further use shall be permitted as from the date of the request.

1.11 Neither Party shall be in breach of this Clause to the extent that it can show that any disclosure of Confidential Information was made solely and to the extent necessary to comply with a statutory, judicial or other obligation of a mandatory nature, afterwards referred to as "Mandatory Obligation". Where a disclosure is made for these reasons, the Party making the disclosure shall ensure that the recipient of the Confidential Information is made aware of and asked to respect its confidentiality. This disclosure shall in no way diminish the obligations of the parties under this Clause except to the extent that a Party is compelled by any Mandatory Obligation to disclose Confidential Information without restriction.

To the extent permitted by any Mandatory Obligation, the Receiving Party shall notify the other Party without delay in writing as soon as it becomes aware of an enquiry or any process of any description that is likely to require disclosure of the other Party's Confidential Information in order to comply with any Mandatory Obligation.

1.12 Upon termination, the Receiving Party shall stop making use of the Confidential Information. The obligations of the Parties under this Agreement shall survive indefinitely or to the extent permitted by the applicable mandatory law.

2 The Parties may consider also inserting a penalty or liquidated damages clause. Any clause of this type should be checked with local counsel to verify its validity and compliance with applicable laws and regulations.

3 In most cases it is not practical to return electronic communication. All copies of electronic data that with reasonable efforts can be expunged from storage, should be (this will involve more than removing the file from the File Allocation Table to ensure that the file is irretrievable). However, in some cases, as a matter of company policy, back-up copies are kept for disaster recovery purposes only and it would not be practical to identify the specific data and delete it. In such cases, deletion is not required.

APPENDIX 5
UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2004[1]

Preamble

Purpose of the Principles

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.*

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may be applied when the parties have not chosen any law to govern their contract.

They may be used to interpret or supplement international uniform law instruments.

They may be used to interpret or supplement domestic law.

They may serve as a model for national and international legislators.

Chapter 1 — General Provisions

Article 1.1

Freedom of contract

The parties are free to enter into a contract and to determine its content.

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1 The reader is reminded that the complete version of the UNIDROIT Principles contains not only the black-letter rules reproduced hereunder, but also detailed comments on each article and, where appropriate, illustrations. The volume may be ordered from UNIDROIT at www.unidroit.org.

For an update of international case law and bibliography relating to the Principles see www.unilex.info.

* Parties wishing to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions or modifications:

"This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles …]".

Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words:

"This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles…], supplemented when necessary by the law of [jurisdiction X].

Article 1.2

No form required

Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.

Article 1.3

Binding character of contract

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.

Article 1.4

Mandatory rules

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.

Article 1.5

Exclusion or modification by the parties

The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.

Article 1.6

Interpretation and supplementation of the Principles

(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.

(2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.

Article 1.7

Good faith and fair dealing

(1) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.

Article 1.8

Inconsistent Behaviour

A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

Article 1.9

Usages and practices

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

Article 1.10

Notice

(1) Where notice is required it may be given by any means appropriate to the circumstances.

(2) A notice is effective when it reaches the person to whom it is given.

(3) For the purpose of paragraph.

(2) a notice "reaches" a person when given to that person orally or delivered at that person's place of business or mailing address.

(4) For the purpose of this article "notice" includes a declaration, demand, request or any other communication of intention.

Article 1.11

Definitions

In these Principles

- "court" includes an arbitral tribunal;
- contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- "obligor" refers to the party who is to perform an obligation and "obligee" refers to the party who is entitled to performance of that obligation.
- "writing" means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

Article 1.12

Computation of time set by parties

(1) Official holidays or non-business days occurring during a period set by parties for an act to be performed are included in calculating the period.

(2) However, if the last day of the period is an official holiday or a non-business day at the place of business of the party to perform the act, the period is extended until the first business day which follows, unless the circumstances indicate otherwise.

(3) The relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise.

Chapter 2 — Formation and Authority of Agents

Section 1: Formation

Article 2.1.1

Manner of formation

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

Article 2.1.2

Definition of offer

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

Article 2.1.3

Withdrawal of offer

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 2.1.4

Revocation of offer

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.

(2) However, an offer cannot be revoked

- (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
- (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 2.1.5

Rejection of offer

An offer is terminated when a rejection reaches the offeror.

Article 2.1.6

Mode of acceptance

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.

Article 2.1.7

Time of acceptance

An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

Article 2.1.8

Acceptance within a fixed period of time

A period of acceptance fixed by the offeror begins to run from the time that the offer is dispatched. A time indicated in the offer is deemed to be the time of dispatch unless the circumstances indicate otherwise.

Article 2.1.9

Late acceptance. Delay in transmission

(1) A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives notice to that effect.

(2) If a communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

Article 2.1.10

Withdrawal of acceptance

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 2.1.11

Modified acceptance

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Article 2.1.12

Writings in confirmation

If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.

Article 2.1.13

Conclusion of contract dependent on agreement on specific matters or in a particular form

Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form.

Article 2.1.14

Contract with terms deliberately left open

(1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence.

(2) The existence of the contract is not affected by the fact that subsequently

(a) the parties reach no agreement on the term; or

(b) the third person does not determine the term, provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

Article 2.1.15

Negotiations in bad faith

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

Article 2.1.16

Duty of confidentiality

Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

Article 2.1.17

Merger clauses

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

Article 2.1.18

Modification in a particular form

A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.

Article 2.1.19

Contracting under standard terms

(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20 – 2.1.22.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.

Article 2.1.20

Surprising terms

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.

Article 2.1.21

Conflict between standard terms and non-standard terms

In case of conflict between a standard term and a term which is not a standard term the latter prevails.

Article 2.1.22

Battle of forms

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

Section 2: Authority of Agents

Article 2.2.1

Scope of the Section

(1) This Section governs the authority of a person (“the agent”), to affect the legal relations of another person (“the principal”), by or with respect to a contract with a third party, whether the agent acts in its own name or in that of the principal.

(2) It governs only the relations between the principal or the agent on the one hand, and the third party on the other.

(3) It does not govern an agent's authority conferred by law or the authority of an agent appointed by a public or judicial authority.

Article 2.2.2

Establishment and scope of the authority of the agent

(1) The principal's grant of authority to an agent may be express or implied.

(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.

Article 2.2.3

Agency disclosed

(1) Where an agent acts within the scope of its authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly affect the legal relations between the principal and the third party and no legal relation is created between the agent and the third party.

(2) However, the acts of the agent shall affect only the relations between the agent and the third party, where the agent with the consent of the principal undertakes to become the party to the contract.

Article 2.2.4

Agency undisclosed

(1) Where an agent acts within the scope of its authority and the third party neither knew nor ought to have known that the agent was acting as an agent, the acts of the agent shall affect only the relations between the agent and the third party.

(2) However, where such an agent, when contracting with the third party on behalf of a business, represents itself to be the owner of that business, the third party, upon discovery of the real owner of the business, may exercise also against the latter the rights it has against the agent.

Article 2.2.5

Agent acting without or exceeding its authority

(1) Where an agent acts without authority or exceeds its authority, its acts do not affect the legal relations between the principal and the third party.

(2) However, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

Article 2.2.6

Liability of agent acting without or exceeding its authority

(1) An agent that acts without authority or exceeds its authority is, failing ratification by the principal, liable for damages that will place the third party in the same position as if the agent had acted with authority and not exceeded its authority.

(2) However, the agent is not liable if the third party knew or ought to have known that the agent had no authority or was exceeding its authority.

Article 2.2.7

Conflict of interests

(1) If a contract concluded by an agent involves the agent in a conflict of interests with the principal of which the third party knew or ought to have known, the principal may avoid the contract. The right to avoid is subject to Articles 3.12 and 3.14 to 3.17.

(2) However, the principal may not avoid the contract

(a) if the principal had consented to, or knew or ought to have known of, the agent's involvement in the conflict of interests; or

(b) if the agent had disclosed the conflict of interests to the principal and the latter had not objected within a reasonable time.

Article 2.2.8

Sub-agency

An agent has implied authority to appoint a sub-agent to perform acts which it is not reasonable to expect the agent to perform itself. The rules of this Section apply to the sub-agency.

Article 2.2.9

Ratification

(1) An act by an agent that acts without authority or exceeds its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

(2) The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal does not ratify within that period of time it can no longer do so.

(3) If, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, it may, at any time before ratification, by notice to the principal indicate its refusal to become bound by a ratification.

Article 2.2.10

Termination of authority

(1) Termination of authority is not effective in relation to the third party unless the third party knew or ought to have known of it.

(2) Notwithstanding the termination of its authority, an agent remains authorised to perform the acts that are necessary to prevent harm to the principal's interests.

Chapter 3 — Validity

Article 3.1

Matters not covered

These Principles do not deal with invalidity arising from

(a) lack of capacity;

(b) immorality or illegality.

Article 3.2

Validity of mere agreement

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

Article 3.3

Initial impossibility

(1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.

(2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

Article 3.4

Definition of mistake

Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.

Article 3.5

Relevant mistake

(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) the other party had not at the time of avoidance reasonably acted in reliance on the contract.

(2) However, a party may not avoid the contract if

(a) it was grossly negligent in committing the mistake; or

(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

Article 3.6

Error in expression or transmission

An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated.

Article 3.7

Remedies for non-performance

A party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance.

Article 3.8

Fraud

A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.

Article 3.9

Threat

A party may avoid the contract when it has been led to conclude the contract by the other party's unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion of the contract.

Article 3.10

Gross disparity

(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.13(2) apply accordingly.

Article 3.11

Third persons

(1) Where fraud, threat, gross disparity or a party's mistake is imputable to, or is known or ought to be known by, a third person for whose acts the other party is responsible, the contract may be avoided under the same conditions as if the behaviour or knowledge had been that of the party itself.

(2) Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or disparity, or has not at the time of avoidance reasonably acted in reliance on the contract.

Article 3.12

Confirmation

If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded.

Article 3.13

Loss of right to avoid

(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance.

(2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective.

Article 3.14

Notice of avoidance

The right of a party to avoid the contract is exercised by notice to the other party.

Article 3.15

Time limits

(1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.

(2) Where an individual term of the contract may be avoided by a party under Article 3.10, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.

Article 3.16

Partial avoidance

Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.

Article 3.17

Retroactive effect of avoidance

(1) Avoidance takes effect retroactively.

(2) On avoidance either party may claim restitution of whatever it has supplied under the contract or the part of it avoided, provided that it concurrently makes restitution of whatever it has received under the contract or the part of it avoided or, if it cannot make restitution in kind, it makes an allowance for what it has received.

Article 3.18

Damages

Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.

Article 3.19

Mandatory character of the provisions

The provisions of this Chapter are mandatory, except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake.

Article 3.20

Unilateral declarations

The provisions of this Chapter apply with appropriate adaptations to any communication of intention addressed by one party to the other.

Chapter 4 — Interpretation

Article 4.1

Intention of the parties

(1) A contract shall be interpreted according to the common intention of the parties.

(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

Article 4.2

Interpretation of statements and other conduct

(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

Article 4.3

Relevant circumstances

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

(a) preliminary negotiations between the parties;

(b) practices which the parties have established between themselves;

(c) the conduct of the parties subsequent to the conclusion of the contract;

(d) the nature and purpose of the contract;

(e) the meaning commonly given to terms and expressions in the trade concerned;

(f) usages.

Article 4.4

Reference to contract or statement as a whole

Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

Article 4.5

All terms to be given effect

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

Article 4.6

Contra proferentem rule

If contract terms supplied by one party are unclear, an interpretation against that party is preferred.

Article 4.7

Linguistic discrepancies

Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.

Article 4.8

Supplying an omitted term

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

(2) In determining what is an appropriate term regard shall be had, among other factors, to

  (a) the intention of the parties;

  (b) the nature and purpose of the contract;

  (c) good faith and fair dealing;

  (d) reasonableness.

Chapter 5 — Content and Third Party Rights

Section 1: Content

Article 5.1.1

Express and implied obligations

The contractual obligations of the parties may be express or implied.

Article 5.1.2

Implied obligations

Implied obligations stem from

(a) the nature and purpose of the contract;

(b) practices established between the parties and usages;

(c) good faith and fair dealing;

(d) reasonableness.

Article 5.1.3

Co-operation between the parties

Each party shall co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

Article 5.1.4

Duty to achieve a specific result. Duty of best efforts

(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.

(2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.

Article 5.1.5

Determination of kind of duty involved

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to

(a) the way in which the obligation is expressed in the contract;

(b) the contractual price and other terms of the contract;

(c) the degree of risk normally involved in achieving the expected result;

(d) the ability of the other party to influence the performance of the obligation.

Article 5.1.6

Determination of quality of performance

Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.

Article 5.1.7

Price determination

(1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.

(2) Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted not withstanding any contract term to the contrary.

(3) Where the price is to be fixed by a third person, and that person cannot or will not do so, the price shall be a reasonable price.

(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

Article 5.1.8

Contract for an indefinite period

A contract for an indefinite period may be ended by either party by giving notice a reasonable time in advance.

Article 5.1.9

Release by agreement

(1) An obligee may release its right by agreement with the obligor.

(2) An offer to release a right gratuitously shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it.

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(a) the way in which the obligation is expressed in the contract;

(b) the contractual price and other terms of the contract;

(c) the degree of risk normally involved in achieving the expected result;

(d) the ability of the other party to influence the performance of the obligation.

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(2) An offer to release a right gratuitously shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it.

Section 2: Third Party Rights

Article 5.2.1

Contracts in favour of third parties

(1) The parties (the “promisor” and the “promisee”) may confer by express or implied agreement a right on a third party (the “beneficiary”).

(2) The existence and content of the beneficiary’s right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

Article 5.2.2

Third party identifiable

The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made.

Article 5.2.3

Exclusion and limitation clauses

The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary.

Article 5.2.4

Defences

The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee.

Article 5.2.5

Revocation

The parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them.

Article 5.2.6

Renunciation

The beneficiary may renounce a right conferred on it.

Chapter 6 — Performance

Section 1: Performance in General

Article 6.1.1

Time of performance

A party must perform its obligations:

(a) if a time is fixed by or determinable from the contract, at that time;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time;

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 6.1.2

Performance at one time or in instalments

In cases under Article 6.1.1(b) or (c), a party must perform its obligations at one time if that performance can be rendered at one time and the circumstances do not indicate otherwise.

Article 6.1.3

Partial performance

(1) The obligee may reject an offer to perform in part at the time performance is due, whether or not such offer is coupled with an assurance as to the balance of the performance, unless the obligee has no legitimate interest in so doing.

(2) Additional expenses caused to the obligee by partial performance are to be borne by the obligor without prejudice to any other remedy.

Article 6.1.4

Order of performance

(1) To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.

(2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

Article 6.1.5

Earlier performance

(1) The obligee may reject an earlier performance unless it has no legitimate interest in so doing.

(2) Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligations if that time has been fixed irrespective of the performance of the other party's obligations.

(3) Additional expenses caused to the obligee by earlier performance are to be borne by the obligor, without prejudice to any other remedy.

Article 6.1.6

Place of performance

(1) If the place of performance is neither fixed by, nor determinable from, the contract, a party is to perform:

- (a) a monetary obligation, at the obligee's place of business;
- (b) any other obligation, at its own place of business.

(2) A party must bear any increase in the expenses incidental to performance which is caused by a change in its place of business subsequent to the conclusion of the contract.

Article 6.1.7

Payment by cheque or other instrument

(1) Payment may be made in any form used in the ordinary course of business at the place for payment.

(2) However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured.

Article 6.1.8

Payment by funds transfer

(1) Unless the obligee has indicated a particular account, payment may be made by a transfer to any of the financial institutions in which the obligee has made it known that it has an account.

(2) In case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective.

Article 6.1.9

Currency of payment

(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless

(a) that currency is not freely convertible; or

(b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.

(2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

Article 6.1.10

Currency not expressed

Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made.

Article 6.1.11

Costs of performance

Each party shall bear the costs of performance of its obligations.

Article 6.1.12

Imputation of payments

(1) An obligor owing several monetary obligations to the same obligee may specify at the time of payment the debt to which it intends the payment to be applied.

However, the payment discharges first any expenses, then interest due and finally the principal.

(2) If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed.

(3) In the absence of imputation under paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria in the order indicated:

(a) an obligation which is due or which is the first to fall due;

(b) the obligation for which the obligee has least security;

(c) the obligation which is the most burdensome for the obligor;

(d) the obligation which has arisen first.

If none of the preceding criteria applies, payment is imputed to all the obligations proportionally.

Article 6.1.13

Imputation of non-monetary obligations

Article 6.1.12 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

Article 6.1.14

Application for public permission

Where the law of a State requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise

(a) if only one party has its place of business in that State, that party shall take the measures necessary to obtain the permission;

(b) in any other case the party whose performance requires permission shall take the necessary measures.

Article 6.1.15

Procedure in applying for permission

(1) The party required to take the measures necessary to obtain the permission shall do so without undue delay and shall bear any expenses incurred.

(2) That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay.

Article 6.1.16

Permission neither granted nor refused

(1) If, notwithstanding the fact that the party responsible has taken all measures required, permission is neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract.

(2) Where the permission affects some terms only, paragraph (1) does not apply if, having regard to the circumstances, it is reasonable to uphold the remaining contract even if the permission is refused.

Article 6.1.17

Permission refused

(1) The refusal of a permission affecting the validity of the contract renders the contract void. If the refusal affects the validity of some terms only, only such terms are void if, having regard to the circumstances, it is reasonable to uphold the remaining contract.

(2) Where the refusal of a permission renders the performance of the contract impossible in whole or in part, the rules on non-performance apply.

Section 2: Hardship

Article 6.2.1

Contract to be observed

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

Article 6.2.2

Definition of hardship

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.

Article 6.2.3

Effects of hardship

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

   (a) terminate the contract at a date and on terms to be fixed, or

   (b) adapt the contract with a view to restoring its equilibrium.

Chapter 7 — Non-Performance

Section 1: Non-Performance in General

Article 7.1.1

Non-performance defined

Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

Article 7.1.2

Interference by the other party

A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event as to which the first party bears the risk.

Article 7.1.3

Withholding performance

(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.

(2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

Article 7.1.4

Cure by non-performing party

(1) The non-performing party may, at its own expense, cure any non-performance, provided that

- (a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;
- (b) cure is appropriate in the circumstances;
- (c) the aggrieved party has no legitimate interest in refusing cure; and
- (d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.

(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

(4) The aggrieved party may withhold performance pending cure.

(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

Article 7.1.5

Additional period for performance

(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.

(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.

(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.

Article 7.1.6

Exemption clauses

A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.

Article 7.1.7

Force majeure

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such nonreceipt.

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

Section 2: Right to Performance

Article 7.2.1

Performance of monetary obligation

Where a party who is obliged to pay money does not do so, the other party may require payment.

Article 7.2.2

Performance of non-monetary obligation

Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

(a) performance is impossible in law or in fact;

(b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;

(c) the party entitled to performance may reasonably obtain performance from another source;

(d) performance is of an exclusively personal character; or

(e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

Article 7.2.3

Repair and replacement of defective performance

The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.

Article 7.2.4

Judicial penalty

(1) Where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order.

(2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages.

Article 7.2.5

Change of remedy

(1) An aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy.

(2) Where the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy.

Section 3: Termination

Article 7.3.1

Right to terminate the contract

(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

(c) the non-performance is intentional or reckless;

(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;

(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

(3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired.

Article 7.3.2

Notice of termination

(1) The right of a party to terminate the contract is exercised by notice to the other party.

(2) If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance.

Article 7.3.3

Anticipatory non-performance

Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.

Article 7.3.4

Adequate assurance of due performance

A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.

Article 7.3.5

Effects of termination in general

(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance.

(2) Termination does not preclude a claim for damages for non-performance.

(3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

Article 7.3.6

Restitution

(1) On termination of the contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable.

(2) However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect.

Section 4: Damages

Article 7.4.1

Right to damages

Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.

Article 7.4.2

Full compensation

(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

(2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

Article 7.4.3

Certainty of harm

(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.

(2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.

(3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

Article 7.4.4

Foreseeability of harm

The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.

Article 7.4.5

Proof of harm in case of replacement transaction

Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.

Article 7.4.6

Proof of harm by current price

(1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.

(2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.

Article 7.4.7

Harm due in part to aggrieved party

Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.

Article 7.4.8

Mitigation of harm

(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.

(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.

Article 7.4.9

Interest for failure to pay money

(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.

(2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

(3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

Article 7.4.10

Interest on damages

Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance.

Article 7.4.11

Manner of monetary redress

(1) Damages are to be paid in a lump sum. However, they may be payable in instalments where the nature of the harm makes this appropriate.

(2) Damages to be paid in instalments may be indexed.

Article 7.4.12

Currency in which to assess damages

Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.

Article 7.4.13

Agreed payment for non-performance

(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.

(2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.

Chapter 8 — Set-Off

Article 8.1

Conditions of set-off

(1) Where two parties owe each other money or other performances of the same kind, either of them (“the first party”) may set off its obligation against that of its obligee (“the other party”) if at the time of set-off,

    (a) the first party is entitled to perform its obligation;

    (b) the other party’s obligation is ascertained as to its existence and amount and performance is due.

(2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.

Article 8.2

Foreign currency set-off

Where the obligations are to pay money in different currencies, the right of set-off may be exercised, provided that both currencies are freely convertible and the parties have not agreed that the first party shall pay only in a specified currency.

Article 8.3

Set-off by notice

The right of set-off is exercised by notice to the other party.

Article 8.4

Content of notice

(1) The notice must specify the obligations to which it relates.

(2) If the notice does not specify the obligation against which set-off is exercised, the other party may, within a reasonable time, declare to the first party the obligation to which set-off relates. If no such declaration is made, the set-off will relate to all the obligations proportionally.

Article 8.5

Effect of set-off

(1) Set-off discharges the obligations.

(2) If obligations differ in amount, set-off discharges the obligations up to the amount of the lesser obligation.

(3) Set-off takes effect as from the time of notice.

Chapter 9 — Assignment of Rights, Transfer of Obligations, Assignment of Contracts

Section 1: Assignment of Rights

Article 9.1.1

Definitions

"Assignment of a right" means the transfer by agreement from one person (the "assignor") to another person (the "assignee"), including transfer by way of security, of the assignor's right to payment of a monetary sum or other performance from a third person ("the obligor").

Article 9.1.2

Exclusions

This Section does not apply to transfers made under the special rules governing the transfers:

(a) of instruments such as negotiable instruments, documents of title or financial instruments, or

(b) of rights in the course of transferring a business.

Article 9.1.3

Assignability of non-monetary rights

A right to non-monetary performance may be assigned only if the assignment does not render the obligation significantly more burdensome.

Article 9.1.4

Partial assignment

(1) A right to the payment of a monetary sum may be assigned partially.

(2) A right to other performance may be assigned partially only if it is divisible, and the assignment does not render the obligation significantly more burdensome.

Article 9.1.5

Future rights

A future right is deemed to be transferred at the time of the agreement, provided the right, when it comes into existence, can be identified as the right to which the assignment relates.

Article 9.1.6

Rights assigned without individual specification

A number of rights may be assigned without individual specification, provided such rights can be identified as rights to which the assignment relates at the time of the assignment or when they come into existence.

Article 9.1.7

Agreement between assignor and assignee sufficient

(1) A right is assigned by mere agreement between the assignor and the assignee, without notice to the obligor.

(2) The consent of the obligor is not required unless the obligation in the circumstances is of an essentially personal character.

Article 9.1.8

Obligor's additional costs

The obligor has a right to be compensated by the assignor or the assignee for any additional costs caused by the assignment.

Article 9.1.9

Non-assignment clauses

(1) The assignment of a right to the payment of a monetary sum is effective notwithstanding an agreement between the assignor and the obligor limiting or prohibiting such an assignment. However, the assignor may be liable to the obligor for breach of contract.

(2) The assignment of a right to other performance is ineffective if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment. Nevertheless, the assignment is effective if the assignee, at the time of the assignment, neither knew nor ought to have known of the agreement. The assignor may then be liable to the obligor for breach of contract.

Article 9.1.10

Notice to the obligor

(1) Until the obligor receives a notice of the assignment from either the assignor or the assignee, it is discharged by paying the assignor.

(2) After the obligor receives such a notice, it is discharged only by paying the assignee.

Article 9.1.11

Successive assignments

If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received.

Article 9.1.12

Adequate proof of assignment

(1) If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable time adequate proof that the assignment has been made.

(2) Until adequate proof is provided, the obligor may withhold payment.

(3) Unless adequate proof is provided, notice is not effective.

(4) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

Article 9.1.13

Defences and rights of set-off

(1) The obligor may assert against the assignee all defences that the obligor could assert against the assignor.

(2) The obligor may exercise against the assignee any right of set-off available to the obligor against the assignor up to the time notice of assignment was received.

Article 9.1.14

Rights related to the right assigned

The assignment of a right transfers to the assignee:

(a) all the assignor's rights to payment or other performance under the contract in respect of the right assigned, and

(b) all rights securing performance of the right assigned.

Article 9.1.15

Undertakings of the assignor

The assignor undertakes towards the assignee, except as otherwise disclosed to the assignee, that:

(a) the assigned right exists at the time of the assignment, unless the right is a future right;

(b) the assignor is entitled to assign the right;

(c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party;

(d) the obligor does not have any defences;

(e) neither the obligor nor the assignor has given notice of set-off concerning the assigned right and will not give any such notice;

(f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.

Section 2: Transfer of Obligations

Article 9.2.1

Modes of transfer

An obligation to pay money or render other performance may be transferred from one person (the "original obligor") to another person (the "new obligor") either

a) by an agreement between the original obligor and the new obligor subject to Article 9.2.3, or

b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.

Article 9.2.2

Exclusion

This Section does not apply to transfers of obligations made under the special rules governing transfers of obligations in the course of transferring a business.

Article 9.2.3

Requirement of obligee's consent to transfer

The transfer of an obligation by an agreement between the original obligor and the new obligor requires the consent of the obligee.

Article 9.2.4

Advance consent of obligee

(1) The obligee may give its consent in advance.

(2) If the obligee has given its consent in advance, the transfer of the obligation becomes effective when a notice of the transfer is given to the obligee or when the obligee acknowledges it.

Article 9.2.5

Discharge of original obligor

(1) The obligee may discharge the original obligor.

(2) The obligee may also retain the original obligor as an obligor in case the new obligor does not perform properly.

(3) Otherwise the original obligor and the new obligor are jointly and severally liable.

Article 9.2.6

Third party performance

(1) Without the obligee's consent, the obligor may contract with another person that this person will perform the obligation in place of the obligor, unless the obligation in the circumstances has an essentially personal character.

(2) The obligee retains its claim against the obligor.

Article 9.2.7

Defences and rights of set-off

(1) The new obligor may assert against the obligee all defences which the original obligor could assert against the obligee.

(2) The new obligor may not exercise against the obligee any right of set-off available to the original obligor against the obligee.

Article 9.2.8

Rights related to the obligation transferred

(1) The obligee may assert against the new obligor all its rights to payment or other performance under the contract in respect of the obligation transferred.

(2) If the original obligor is discharged under Article 9.2.5(1), a security granted by any person other than the new obligor for the performance of the obligation is discharged, unless that other person agrees that it should continue to be available to the obligee.

(3) Discharge of the original obligor also extends to any security of the original obligor given to the obligee for the performance of the obligation, unless the security is over an asset which is transferred as part of a transaction between the original obligor and the new obligor.

Section 3: Assignment of Contracts

Article 9.3.1

Definitions

"Assignment of a contract" means the transfer by agreement from one person (the "assignor") to another person (the "assignee") of the assignor's rights and obligations arising out of a contract with another person (the "other party").

Article 9.3.2

Exclusion

This Section does not apply to the assignment of contracts made under the special rules governing transfers of contracts in the course of transferring a business.

Article 9.3.3

Requirement of consent of the other party

The assignment of a contract requires the consent of the other party.

Article 9.3.4

Advance consent of the other party

(1) The other party may give its consent in advance.

(2) If the other party has given its consent in advance, the assignment of the contract becomes effective when a notice of the assignment is given to the other party or when the other party acknowledges it.

Article 9.3.5

Discharge of the assignor

(1) The other party may discharge the assignor.

(2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly.

(3) Otherwise the assignor and the assignee are jointly and severally liable.

Article 9.3.6

Defences and rights of set-off

(1) To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.13 applies accordingly.

(2) To the extent that the assignment of a contract involves a transfer of obligations, Article 9.2.7 applies accordingly.

Article 9.3.7

Rights transferred with the contract

(1) To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.14 applies accordingly.

(2) To the extent that the assignment of a contract involves a transfer of obligations, Article 9.2.8 applies accordingly.

Chapter 10 — Limitation Periods

Article 10.1

Scope of the Chapter

(1) The exercise of rights governed by these Principles is barred by the expiration of a period of time, referred to as “limitation period”, according to the rules of this Chapter.

(2) This Chapter does not govern the time within which one party is required under these Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or to perform any act other than the institution of legal proceedings.

Article 10.2

Limitation periods

(1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised.

(2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised.

Article 10.3

Modification of limitation periods by the parties

(1) The parties may modify the limitation periods.

(2) However they may not

(a) shorten the general limitation period to less than one year;

(b) shorten the maximum limitation period to less than four years;

(c) extend the maximum limitation period to more than fifteen years.

Article 10.4

New limitation period by acknowledgement

(1) Where the obligor before the expiration of the general limitation period acknowledges the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgement.

(2) The maximum limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Art. 10.2 (1).

Article 10.5

Suspension by judicial proceedings

(1) The running of the limitation period is suspended

(a) when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court asasserting the obligee's right against the obligor;

(b) in the case of the obligor's insolvency when the obligee has asserted its rights in the insolvency proceedings; or

(c) in the case of proceedings for dissolution of the entity which is the obligor when the obligee has asserted its rights in the dissolution proceedings.

(2) Suspension lasts until a final decision has been issued or until the proceedings have been otherwise terminated.

Article 10.6

Suspension by arbitral proceedings

(1) The running of the limitation period is suspended when the obligee performs any act, by commencing arbitral proceedings or in arbitral proceedings already instituted, that is recognised by the law of the arbitral tribunal as asserting the obligee's right against the obligor. In the absence of regulations for arbitral

proceedings or provisions determining the exact date of the commencement of arbitral proceedings, the proceedings are deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor.

(2) Suspension lasts until a binding decision has been issued or until the proceedings have been otherwise terminated.

Article 10.7

Alternative dispute resolution

The provisions of Articles 10.5 and 10.6 apply with appropriate modifications to other proceedings whereby the parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute.

Article 10.8

Suspension in case of force majeure, death or incapacity

(1) Where the obligee has been prevented by an impediment that is beyond its control and that it could neither avoid nor overcome, from causing a limitation period to cease to run under the preceding articles, the general limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.

(2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor has inherited the respective party's position. The additional one-year period under paragraph (1) applies accordingly.

Article 10.9

The effects of expiration of limitation period

(1) The expiration of the limitation period does not extinguish the right.

(2) For the expiration of the limitation period to have effect, the obligor must assert it as a defence.

(3) A right may still be relied on as a defence even though the expiration of the limitation period for that right has been asserted.

Article 10.10

Right of set-off

The obligee may exercise the right of set-off until the obligor has asserted the expiration of the limitation period.

Article 10.11

Restitution

Where there has been performance in order to discharge an obligation, there is no right of restitution merely because the limitation period has expired.

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